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No. 99-____
In the Supreme Court of the United States
October Term, 1999

JOAN YUKINS, WARDEN,

Petitioner,

v.

STACEY BARKER,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent was convicted in state court of murdering an eighty-one-year-old retired minister who died from ten blows to the head and thirty-two stab wounds to the back. She claimed self-defense. The jury was given a standard instruction that she could use deadly force to defend herself from death or "serious bodily harm," but the court declined to give a modified instruction that she could use deadly force to resist a "sexual assault." The Michigan Supreme Court found the instructions erroneous under Michigan law, but held that the error was harmless.

I.

Did the jury instructions on self-defense violate her federal constitutional rights as determined by the United States Supreme Court?

II.

When a federal habeas corpus court evaluates a state court determination of harmless error under §2254(d) of the Antiterrorism and Effective Death Penalty Act, what is the appropriate standard for determining "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States?"

PARTIES TO THE PROCEEDING

Petitioner Joan Yukins is the Warden of the Scott Correctional Facility in Plymouth, Michigan, and Respondent is Stacey Barker, an inmate confined by the Michigan Department of Corrections under a non parolable life sentence for first degree murder.

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Petitioner respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, to review the judgment entered in the above-entitled case on December 15, 1999.

OPINIONS BELOW

The December 15, 1999 opinion of the Sixth Circuit Court of Appeals is reported at 199 F.3d 867 (6th Cir. 1999) but is reprinted in the appendix for the Court's convenience. App. 1a. The January 30, 1998 District Court judgment and order which adopted the magistrate's December 2, 1997 Report and Recommendation to deny the writ of habeas corpus are not reported and are reprinted in the Appendix to this petition. App. 16a. The Magistrate's Report and Recommendation is reprinted at 16a. The Michigan Supreme Court opinion in *People v. Barker*, which was reviewed by the federal court pursuant to the petition for writ of habeas corpus, is reported at 437 Mich. 161 (1991) and reprinted in the Appendix for the Court's convenience. App. 43a. The opinion of the Michigan Court of Appeals is reported at 179 Mich. App. 702 (1989) and is reprinted at App. 56a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed with its Clerk's office on December 15, 1999. The State's Motion to Stay the Mandate was filed with the Sixth Circuit Court of Appeals Clerk's office on January 3, 2000. The Court's order granting the Motion to Stay the Mandate was filed with its Clerk's office on January 20, 2000.

28 U.S.C. §1254(1) provides that cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. §2241(c)(3) provides:

> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

28 U.S.C. §2254(a) provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

28 U.S.C. §2254(d) of the Antiterrorism and Effective Death Penalty Action provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

STATEMENT OF THE CASE

On November 17, 1987, Respondent Barker was convicted by a jury of first degree murder. Barker did not testify at trial. Her defense to the killing of the 81 year old victim was that she was defending herself from a sexual assault, as she had claimed in a statement to police. She was sentenced to a mandatory term of non parolable life imprisonment. In her appeal of right in the state court Barker claimed that the trial court erred when it denied her request for a more specific self-defense jury instruction stating that she was entitled to use deadly force to repel a sexual assault. The trial court instructed the jury on the right to use deadly force to repel an attempt to cause death or serious bodily harm. The Michigan Supreme Court held that the trial court had committed an error of state law in failing to give the requested instruction. The Michigan Supreme Court concluded that the error was harmless, however, because the evidence "thoroughly contradicted the defendant's version of how and why she killed the elderly and infirm victim" and that "no reasonable juror would have believed the defendant's claim of self-defense." *People v. Barker*, 437 Mich. 161, 164 (1991).

The evidence revealed that the victim was an insulin-dependent diabetic. His other medical problems included atherosclerotic disease (hardening of the arteries), aortic iliac disease, which compromised the blood flow to his legs, especially to the left lower extremities. Additionally, the victim's balance and gait were unsteady. (T-III, pp 26-29) The victim was hypersensitive to touch and had to use a cane to walk. (T-III, p 31) The victim was 81 years old, 5'10" and weighted 280 pounds. (T-II, pp 20-21) Respondent was in her early twenties, was 5'7" tall and weighed 170 pounds. 437 Mich. at 164, App. 46a.

Dr. Brook's external examination revealed two types of trauma. The first was caused by a blunt object which led to lacerations of the scalp and underlying soft tissue about the left ear and back of the skull. At least 10 blows were struck and resulted in bruising on the brain. Barker stipulated that a statuette, admitted as Px exhibit #1, was the object used to cause the blunt trauma. (T-II, pp 21-24) The victim also had

abrasive facial wounds across the nose, eyes, left cheek and jaw. The second type of external injuries suffered by the victim was caused by a cluster of stab wounds located in a regular, oval pattern between the upper portion of the left axilla and shoulder blade. Up to 32 stab wounds were found in the five inch area. (T-II, pp 27-28) Finally, there were a number of scratches on the victim's chest of unknown origin, and on his right hand over the knuckles. These latter injuries were more than scrapes since there were underlying soft tissue bruising and bleeding. (T-II, pp 29-30) At least eight of the stab wounds on the back had penetrated the right upper quadrant of the lung causing hemopneumothorax to the left lung. (T-II, pp 32-33) The head wounds were not lethal but may have rendered the victim unconscious. They were probably inflicted on the victim before he was stabbed. (T-II, pp 34-35) The cause of death was multiple stab wounds to the left thorax. The time of death as sometime during evening hours of November 5, 1986. (T-II, p 35). There were three distinct pools of blood on the kitchen floor and a trail of blood from pool to pool (T IV, p 96), from which the jury could infer that the victim had attempted to crawl away from his attacker, Barker.

Barker filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan on March 27, 1997. On January 30, 1988, the District Court adopted the report and recommendation of a magistrate that habeas relief be denied because the state court decision was not an "unreasonable application of clearly established federal law."

On December 15, 1999, a panel of the Sixth Circuit Court of Appeals reversed the decision of the District Court and granted Barker's application for a writ of habeas corpus. The Court of Appeals held that the trial court's error in failing to specifically instruct the jury that Barker would have been justified in using deadly force to stop an imminent sexual assault had a substantial and injurious effect in determining the jury's verdict and resulted in actual prejudice to Barker. App. 9a. The Court further held that the Michigan Supreme Court improperly invaded the province of the jury in finding that the trial court's failure to instruct on this state law

affirmative defense was harmless error. Finally, the Court of Appeals found that the Michigan Supreme Court's finding of harmless error substantially impaired Barker's due process rights to present a full defense.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION EXPANDS THE SCOPE OF HABEAS CORPUS RELIEF BEYOND RECOGNIZED CONSTITUTIONAL PROTECTIONS TO INCLUDE STATE LAW ERRORS IN THE INSTRUCTION TO THE JURY REGARDING AFFIRMATIVE DEFENSES. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE LIMITATIONS ON HABEAS RELIEF IMPOSED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT WITH RESPECT TO COGNIZABLE CLAIMS AND THE APPROPRIATE STANDARD TO BE USED IN REVIEWING A STATE COURT'S HARMLESS ERROR ANALYSIS.

I. THE COURT OF APPEALS IMPROPERLY GRANTED HABEAS CORPUS RELIEF BASED ON AN ERROR OF STATE LAW WHICH DID NOT INVOLVE A FEDERAL CONSTITUTIONAL RIGHT.

The Court of Appeals granted habeas corpus relief without finding a constitutional violation. In reversing the District Court and granting the writ of habeas corpus, the Court of Appeals focused only on whether "the Michigan Supreme Court's finding of harmless error was contrary to, or involved an unreasonable application of, federal law." Thus, in its analysis, the Court of Appeals improperly bypassed the requisite threshold determination of whether the state instructional error at issue was of constitutional proportion. 28 U.S.C. §2241(c)(3); 28 U.S.C. §2254(a). For if the failure to provide a state law affirmative defense instruction was only an error of state law, and did not deprive Barker of a clearly established constitutional right as determined by this Court, then the manner in which the state courts addressed this state law error cannot be the basis for granting a writ of habeas corpus.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 26, 1996), codified at 28 U.S.C. §2254(d), governs review of state court decisions in habeas actions. This statutory provision provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The statute requires a federal court, in determining whether habeas relief is warranted under 28 U.S.C. §2254(d), to compare a State court's decision with pertinent United States Supreme Court law. The Sixth Circuit has determined that this provision prevents a habeas court from looking at lower federal court decisions in deciding whether a state court decision is contrary to, or an unreasonable application of, clearly established federal law. *Herbert v. Billy*, 160 F.3d 1131 (6th Cir. 1998)

In this matter, the Court of Appeals did not identify any Supreme Court decisions which find a constitutional right to affirmative defense instructions in a criminal trial. In fact, Supreme Court precedent has held to the contrary. In *Gilmore v. Taylor*, 508 U.S. 333 (1993), this Court determined that its precedent did not establish a defendant's constitutional right to a jury instruction on an affirmative defense. The defendant in *Gilmore* sought to establish that the structure of particular jury instructions, which created a risk that the defendant

might be convicted of murder without the jury ever considering his mitigating mental health defense, violated his due process rights under existing Supreme Court precedent. In surveying its own precedent, this Court concluded, 508 U.S. at 341:

> [T]he cases following *Cupp* in the [*In Re*] *Winship* [, 397 U.S. 358 (1970)] line establish that States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but that they may place on defendants the burden of proving affirmative defenses. See *Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).*
>
> * * *
>
> [O]utside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief. *Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).*

In *Martin v. Ohio*, 480 U.S. 228 (1987), this Court reaffirmed the longstanding principle it established in *In re Winship*, 397 U.S. 358 (1970), that due process mandates that the prosecution establish each element of the crime beyond a reasonable doubt. It further concluded that this burden does not extend to affirmative defenses, 480 U.S. at 232-233:

> *In re Winship, 397 U.S. 358, 364 (1970)*, declared the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge." A few years later, we held that *Winship's* mandate was fully satisfied where the State of New York had proved beyond reasonable doubt each of the elements of murder, but placed on the defendant

> the burden of proving the affirmative defense of extreme emotional disturbance, which, if proved, would have reduced the crime from murder to manslaughter. *Patterson v. New York, supra.* . . . To convict of murder, the jury was required to find beyond a reasonable doubt, based on all the evidence, including that related to the defendant's mental state at the time of the crime, each of the elements of murder and also to conclude that the defendant had not proved his affirmative defense. The jury convicted Patterson, and we held there was no violation of the Fourteenth Amendment as construed in *Winship*. Referring to *Leland v. Oregon, 343 U.S. 790 (1952)*, and *Rivera v. Delaware, 429 U.S. 877 (1976)*, we added that New York "did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause" and declined to reconsider those cases. *432 U.S., at 206, 207.* It was also observed that "the fact that a majority of the States have now assumed the burden of disproving affirmative defenses -- for whatever reasons -- [does not] mean that those states that strike a different balance are in violation of the Constitution. *Id.*, at 211. . . ."

Thus, the Court of Appeals' grant of a writ of habeas corpus based upon a State law error regarding instructions on an affirmative defense is contrary to the habeas corpus statute and contrary to this Court's decisions. 28 U.S.C. §§2241(c)(3), 2254(a). There is no clearly established federal constitutional right to have a state law affirmative defense instruction presented to the jury. Accordingly, the Sixth Circuit did not have the authority under §2254(d)(1) to grant a writ of habeas corpus on a claim which was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

If this Court allows the Court of Appeals opinion to stand, it would effectively expand the federal courts' ability to grant habeas relief on any number of State law errors simply

by focusing on the manner in which the State court performed a harmless error analysis on its own State law. This is prohibited by 28 U.S.C. §§2241(c)(3), 2254(a) and 2254(d).

It should be noted parenthetically that the Sixth Circuit cannot fulfill the requirement to identify a constitutional violation by simply declaring that the Michigan Supreme Court's harmless error analysis of a State law error deprived the defendant of the right to present a defense. (See *Barker* opinion, at 14-15; App. 12a-14a) As noted in *Rose v. Clark*, 478 U.S. 570 (1986), harmless error analysis by its very nature denies a defendant the opportunity to have a jury consider his case without the error. Thus, it could always be suggested that an appellate court's finding of harmless error impairs a defendant's due process right to present a full defense. However, *Gilmore* reaffirmed Supreme Court precedent that the right to present a defense is implicated only when evidence is excluded from the jury's consideration, and not when an erroneous jury instruction may effect the jury's ability to consider the admitted evidence. *Gilmore*, 508 U.S. at 343, 344.

II. THE COURT OF APPEALS DID NOT APPLY THE DEFERENTIAL STANDARD OF REVIEW MANDATED BY § 2254(d) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT IN CONSIDERING THE STATE COURT'S HARMLESS ERROR ANALYSIS.

A. This Court Should Grant Certiorari to Resolve the Differing Formulations Used by the Courts of Appeals in Interpreting the Phrase "Unreasonable Application of Clearly Established Federal Law" in 28 U.S.C. §2254(d)(1).

On direct appeal of criminal convictions State courts evaluate claims of harmless error under the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967) to determine whether the error "was harmless beyond a reasonable doubt." The Michigan Supreme Court found an error of Michigan law in the instructions, but held that the error was harmless. Prior

to enactment of the AEDPA in 1996, federal habeas corpus courts evaluated State court determinations of harmless error under the standard enunciated in *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353 (1993) (adopting the standard from *Kotteakos v. United States*, 328 U.S. 750 (1946)) that "an error requires reversal only if it 'had substantial and injurious effect or influence in determining the jury's verdict.'"

Two points were critical in the *Brecht* Court's decision to adopt a more deferential standard of review of constitutional error on collateral habeas corpus review than on direct State court review. First, at the time *Brecht* was decided, "[t]he federal habeas corpus statute [was] silent" concerning the appropriate standard of review. 123 L.Ed.2d at 368. Second, this Court went to great lengths to reiterate that habeas corpus relief should only be granted in extreme cases since collateral review of State court convictions is an extraordinary process which significantly interferes with State sovereignty and legitimate State interests in finality of judgments. 123 L.Ed.2d at 370-373.

In the present case the Court of Appeals failed to give heed to Congress's enactment of a standard of review in the AEDPA and failed, under any standard, to give proper deference to the Michigan Supreme Court's determinations. 28 U.S.C. §2254(d)(1) now prohibits a federal habeas corpus court from granting relief unless a State court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court. As the Report and Recommendation of the Magistrate (App. 31a-32a) and the Court of Appeals opinion (App. 7a-9a) in the present case demonstrate, federal circuit courts of appeals have formulated various interpretations of this statutory language. The Magistrate correctly noted that, "This [statutory] standard is more deferential than the pre-AEDPA standard." App. 31a. The Magistrate then went on to quote from a Fifth Circuit case, *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. den.* 117 S.Ct. 1114 (1997), App. 32a:

> "This "unreasonable application" standard of review of a state court decision must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a *de novo* review. The use of the word "unreasonable" in formulating this restrictive standard of review implicitly denotes that federal courts must respect all *reasonable* decisions of state courts. Thus, given the statutory language, and in light of the legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is *unreasonable* only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 768-69; *accord Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored. By posing the question whether the state court's treatment was 'unreasonable,' § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject."), *revd on other grounds*, 117 S.Ct. 2059 (1997)." (Footnote omitted).

The Fourth and Eleventh Circuits have adopted the *Drinkard* test. *Green v. French*, 143 F.3d 865 (4th Cir. 1998).

The Court of Appeals criticized the Magistrate for interpreting the statutory word "unreasonable" in its "ordinary sense as synonymous with irrational, illogical or unsubstantiated." The Court held that in the Sixth Circuit "a plaintiff does not have to demonstrate that the state court's determination was irrational, illogical, or unsubstantiated." App. 9a, fn 5.

The Court of Appeals recognized that, "[t]here has been serious confusion among the circuits as to what constitutes an unreasonable application of federal law," and cited *Drinkard* and *"O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998) (finding that for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes)." App. 7a. The Court relied on the earlier Sixth Circuit decision in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir) cert. den. 119 S.Ct. 2340 (1999) which purportedly "blends both the First Circuit's and the Fifth Circuit approaches." App. 7a. In *Nevers*, the Court held that the enactment of the AEDPA did not change prior law with respect to evaluating state court determinations of harmless error, 169 F.3d at 371: "We think that the amendments to § 2254(d) do not vitiate in any way the premise set out in *Brecht v. Abrahamson*. . . ."

It is apparent that the federal circuit courts of appeals are in disagreement over how to interpret the "unreasonable application" language of 28 U.S.C. §2254(d)(1). This Court should grant certiorari to resolve this inconsistency.

B. The Court of Appeals Failed to Give Appropriate Deference to the Michigan Supreme Court's Determination of Harmless Error.

Despite discussing various formulations of the appropriate standard of deference, a review of the Court of

Appeals opinion reveals that it disagreed with, and simply substituted its judgment for, the determination of the Michigan Supreme Court. Ironically, the Court quoted a Michigan Court of Appeals judge in support of its conclusion, App. 9a-10a, but that judge herself found the error to be harmless. App. 63a. The Court then proceeded to apply several incorrect standards. It conceded that it "had no way of knowing what effect" the erroneous instruction had, yet granted the writ because the instruction "left the door wide open" and "gave the jurors the latitude" to possibly reach an incorrect conclusion. App. 10a.

The Court then turned the habeas corpus standard of review completely on its head: "Only if a federal habeas corpus court can say with certainty that a trial error had little to no impact on the judgment, should the judgment stand." App. 10a. This is flatly contrary to the requirement of giving deference to state courts. *Brecht*, 123 L.Ed.2d at 372, which the Court of Appeals was purporting to follow, says just the opposite:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error.

See also, *Calderon v. Thompson*, 523 U.S. 538, 557 (1998)(involving 28 U.S.C. §2241(b) and overturning an order recalling a mandate as an abuse of discretion), where this Court discussed the values and purposes underlying the AEDPA and noted that a "central concern" of the amendments counsels against revisiting the merits of concluded state court criminal proceedings.

The Court of Appeals criticized the Michigan Supreme Court for evaluating evidence, App. 11a, but did not explain how a harmless error determination could be made without doing so. Instead it simply gave full credence to the respondent's version of events. The Court was simply wrong in saying that the Michigan Supreme Court violated

respondent's right to a jury trial and to due process. The Court recognized that under *Rose v. Clark*, 478 U.S. 570 (1986), a harmless error analysis permits a court to determine that a trial error, even if corrected, would have had no effect on the jury's verdict, even though this determination invades the province of the jury. Nonetheless, the Court of Appeals summarily rejected the Michigan Supreme Court's conclusions. App. 13a.

The Court of Appeals did not cite any authority for its novel proposition that a harmless error analysis does not by its very nature require review of the evidence, including the weighing of credibility and evaluation of conflicting evidence. In effect, the Court of Appeals suggests that if a defendant submits some evidence on the contested issue, then a reviewing court is precluded from performing a harmless error analysis by evaluating the relative strength of that evidence. On the contrary, in *Neder v. United States*, 527 U.S. ___; 144 L.Ed.2d 35, 53 (1999), this Court recently determined that a reviewing court can find harmless error regarding a contested element of a crime if it determines that the defendant failed to present sufficient evidence to support a contrary finding on that element.

The Court of Appeals not only failed to give any deference to the Michigan Supreme Court's determination, it is also based on pure speculation. The Court said "there was sufficient evidence in the record which might have supported rational conclusions" favorable to respondent and said that respondent's version "might support an inference" favorable to her.

In summary, the Court of Appeals' conclusion is based on an incorrect interpretation of the statute and an improper derogation of the Michigan Supreme Court's determinations.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant certiorari, reverse the judgment of the Court of Appeals, and declare:

1. a State law instructional error on an affirmative defense cannot form the basis for habeas relief; and

2. the AEDPA mandates that the federal courts give great deference to a State court determination of harmless error and may reject such a determination only if the applicant demonstrates that it is based on an unreasonable application of clearly established federal law as determined by this Court.

Respectfully submitted,

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March, 2000

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STACEY BARKER,

Petitioner-Appellant,

No. 98-1237

v.

JOAN YUKINS, in her official capacity as Warden of the Scott Correctional Facility, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 97-71292---Gerald E. Rosen, District Judge.

Argued: August 11, 1999

Decided and Filed: December 15,1999

Before: KEITH and RYAN, Circuit Judges; HULL,* District Judge.

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*The Honorable Thomas C. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

COUNSEL

ARGUED: Stuart G. Friedman, Ann Arbor, Michigan, for Appellant. Diane L. Galbraith, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellees. **ON BRIEF:** Stuart G. Friedman, Ann Arbor, Michigan, for Appellant. Diane L. Galbraith, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellees.

OPINION

DAMON J. KEITH, Circuit Judge. Petitioner Stacey Barker appeals from a district court judgment denying her petition for a writ of habeas corpus. Barker contends that she was denied her constitutional right to a jury trial when the Michigan Supreme Court found that an erroneous jury instruction given during her state court trial was harmless. For the reasons discussed below, this panel agrees, and reverses the district court's denial of the writ. We grant a conditional writ of habeas corpus, which shall become unconditional unless the State of Michigan commences trial proceedings within 180 days of this opinion.

I. BACKGROUND

Factual Background

Petitioner Stacey Barker worked as a companion for a resident of a senior citizens' complex. During her frequent visits to the senior citizens' complex, Barker met and began a friendship with another resident, 81-year old Frank Madsen.

Barker admits to killing Madsen on the evening of November 5, 1986, but claims she did so in self defense.

Barker testified that Madsen called her on November 5th and asked her to visit. While they were watching television,

Barker testified that Madsen began touching her and pulling on her clothing. Barker stated that she repeatedly asked Madsen to stop, but he refused to do so. Barker became frightened by Madsen's behavior. In an effort to end the attack, Barker grabbed a small wooden statute and struck Madsen on the head several times. Unswayed by these blows, Barker testified that Madsen persisted in his attack by grabbing her harder, pulling on her clothing and attempting to kiss her. At some point during the struggle, Madsen backed Barker into the kitchen. Barker grabbed a knife[1] which was lying around and repeatedly stabbed Madsen. Madsen subsequently died of his injuries.

Procedural Background

Petitioner Barker was first tried in state court on first degree murder charges in October of 1987. The jury was unable to reach a verdict. Barker was retried before a different jury in November of 1987, and was ultimately convicted of first degree murder for the death of Madsen. She was sentenced to a term of life imprisonment without the possibility of parole. Barker appealed her conviction to the Michigan Court of Appeals, raising three assignments of error. *People v. Barker*, 446 N.W.2d 549 (Mich. Ct. App. 1989). Only one of those assignments of error, whether the trial court erred in refusing to specifically instruct the jury that Petitioner was entitled to use deadly force to resist an imminent rape, is relevant for purposes of the instant appeal.[2] As to that assignment of error, the Michigan Court of Appeals concluded that the trial court's failure to deliver the requested instruction was not erroneous. *See id.* at 551-52. The court reasoned that the instruction the trial court did provide adequately instructed the jury that a defendant may lawfully use lethal

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[1] The medical examiner estimated that Madsen's injuries were consistent with an instrument which was 3/4 of an inch wide, had one sharp edge, one dull edge blade and was capable of inflicting a wound approximately five inches deep. (J.A. at 428). The knife, which was introduced into evidence as the weapon used by Barker, was consistent with those estimates. *Id.*

[2] By way of Order filed August 12, 1998, the Sixth Circuit granted Barker's motion for certificate of appealability with respect to one issue only: whether the trial court violated Barker's due process rights by refusing to instruct the jury that a defendant was entitled to use deadly force to resist a sexual assault. The motion was denied as to all other issues presented.

force in self defense if the person honestly believes she is in danger of death or serious bodily injury. *See id.* at 552. The court further concluded that a defendant is not entitled to have the general self defense instruction tailored to specifically instruct the jury that deadly force may be used to resist a particular type of assault, in this case, a rape. *See id.* at 551-52. Thus, the court upheld Barker's conviction.

On review, the Michigan Supreme Court disagreed with the Michigan Court of Appeals and found that the trial court did err in refusing to instruct the jury that Barker would be entitled to use force, even deadly force, if she believed she was about to be raped. *People v. Barker,* 468 N.W.2d 492, 493 (Mich. 1991). The Michigan Supreme Court, however, found that the error was harmless because no reasonable juror would have believed Petitioner's claim of self defense. *See id.* at 493-94. The Michigan Supreme Court found it persuasive that Madsen was 81 years old, walked with a cane, and was described as unsteady on his feet, while Barker was in her early twenties, was five feet seven inches tall and weighed 170 pounds. *See id.* at 494. The court also found it significant that Madsen suffered ten blows to the head and was stabbed thirty two times. *See id.* On the basis of that evidence. the court concluded that no reasonable juror could have believed such force was necessary to prevent a rape by the "enfeebled" victim. *See id.*

Subsequent to the Michigan Supreme Court's ruling upholding her conviction, Petitioner Barker filed a petition for a writ of habeas corpus in the district court on March 27, 1997. The district court, adopting a report and recommendation submitted by a magistrate judge, denied Barker's petition for habeas relief on January 30, 1998.

On August 12, 1998, this Court granted Barker's motion for a certificate of appealability, limited to the question of whether Ms. Barker's due process rights were violated by failing to instruct the jury that she had a right to use lethal force to resist a sexual assault. The motion was denied as to the other issues raised by Petitioner.

II. DISCUSSION

Applicability of the Antiterrorism and Effective Death Penalty Act

An appellate court reviews a district court's decision to deny or grant a writ of habeas corpus *de novo*, but it reviews the district court's factual findings only for clear error. *See McQueen, v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257, 117 S.Ct. 2422, 138 L.Ed.2d 185 (1977).

We must further consider the substantive standards utilized when reviewing state court decisions which are challenged by filing a petition for a writ of habeas corpus. The district court, by adopting the report and recommendation of the magistrate judge, found that Petitioner Barker's claim for habeas relief should be analyzed pursuant to the standards established by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a petition for writ of habeas corpus may only be granted where the state court proceedings: (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision which was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. *See* 28U.S.C. § 2254(d).

Petitioner argues on appeal, as she did below, that this matter is[3] not governed by the requirements established by AEDPA. Since her state criminal appeals were completed prior to the passage of AEDPA, Petitioner Barker contends that applying AEDPA to her claims would result in an improper, retroactive application of new legislation, and would unlawfully delegate the constitutional adjudication power of this federal appellate court to state court.

It is now well settled that AEDPA applies to all habeas petitions filed on or after its April 24, 1996 effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 2068, 138

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[3] Since AEDPA requires heightened respect for a state court's legal and factual determinations, *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998), if AEDPA is inapplicable an appellate court would employ more lenient, pre-AEDPA standards of review.

L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 [which include § 2254(d)] generally apply only to cases filed after AEDPA became effective); *see also Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, --U.S. --, 118 S.Ct. 1044, 140 L.Ed.2d 109 (1998) ("Because petitioner filed his application for a writ of habeas corpus on July 26, 1996, after the effective date of AEDPA, the revised § 2254(d) governs our inquiry. . . ."); *Herbert*, 160 F.3d at 1134 ("The AEDPA applies to all habeas cases filed after April 24, 1996.").

Clearly, then, the fact that Barker's state criminal appeals were completed prior to the effective date of AEDPA is of absolutely no consequence in ascertaining whether AEDPA is or is not applicable. Rather, the determining factor is whether Barker's petition for habeas relief was filed before or after AEDPA's effective date. Since Barker filed for a writ of habeas corpus on March 27, 1997, well after the April 24, 1996 effective date of AEDPA, the district court properly concluded that the standards set forth in AEDPA are applicable to Barker's habeas.

Analysis of Petitioner's Habeas Claim

Over defense counsel's objection, the trial court delivered a general instruction on the issue of self defense which informed the jury that a defendant is entitled to use force, even deadly force, if the defendant believed she was in danger of death or serious bodily harm. Petitioner's counsel had requested, but was denied, that the instruction specifically inform the jury, as required by Michigan law, that the use of deadly force is lawful where one is in danger of death or grave bodily harm, including a sexual assault. *See People v. Heflin*, 456 N.W.2d 10, 22-23 (1990) (finding that where there is an evidentiary basis, a court must instruct the jury that force, including deadly force, may be used to repel an imminent sexual assault). The Michigan Supreme Court, citing to its decision in *Heflin*, found that the trial court erred when it failed to instruct the jury that a defendant may lawfully use force, including deadly force, to repel an imminent sexual assault. *Barker*, 468 N.W.2d at 493. However, the Michigan Supreme Court proceeded to conclude that such an error was

harmless. *Id.* Thus, the issue raised by Petitioner Barker's habeas petition is whether, under § 2254(d), the Michigan Supreme Court's finding of harmless error was contrary to, or involved an unreasonable application of, federal law. We find that it was unreasonable, and reverse the district court's ruling to the contrary.

There has been serious confusion among the circuits as to what constitutes an unreasonable application of federal law, and, consequently, several of our sister circuits have adopted varying standards of interpretation. *See, e.g., O'Brien v.. Dubois,* 145 F.3d 16, 25 (1st Cir. 1998) (finding that for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes); *Drinkard v. Johnson,* 97 F.3d 751,769 (5th Cir. 1996), *cert. denied,* 520 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997) (holding that an unreasonable application of law occurs only when a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists). The Sixth Circuit has recently clarified what constitutes an "unreasonable application" under 2254(d) within its jurisdiction. Adopting a standard which blends both the First Circuit's and the Fifth Circuit's approaches, this Court determined that, as a general rule, the "unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among reasonable jurists,' if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes."' *Nevers v. Killinger,* 169 F.3d 352, 362 (6th Cir.) (internal citations omitted), *cert. denied,* -- U.S. --, 119 S.Ct. 2340, -- L.Ed.2d -- (1999). Thus, in the Sixth Circuit, a state court's application of federal law is unreasonable and a writ may issue only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible credible outcomes. *Id.* at 371.

With the general habeas principles in mind, the question now becomes how to apply the basic habeas test announced in *Nevers* to the specific issue before us, namely whether the Michigan Supreme Court's finding of harmless error involved

an unreasonable application of federal law. Fortunately, *Nevers* is also instructive on this question, as the *Nevers* court framed § 2254(d)'s general "unreasonable application" standard within the harmless error context.

> [W]hen the issue before the federal habeas court is the state court's finding of harmless error . . . [the] test is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict,' [and] it is the habeas petitioner's burden to demonstrate that the trial error resulted in 'actual prejudice.' If the petitioner is able to make that showing, he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of *Chapman [v. California]*.[4]

Id. at 371-372 (internal citations omitted). Hence, Petitioner Barker must demonstrate that the district court's failure to specifically instruct the jury that she was justified in using deadly force to resist a rape had a substantial and injurious effect or influence in determining the jury's verdict and resulted in actual prejudice. If Barker can make this showing, *Nevers* dictates that she will have satisfied the "unreasonable application" standard required by § 2254(d) of AEDPA and

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[4] To reiterate, § 2254(d) allows a habeas court to review a state court's adjudication only where an unreasonable application of federal law has occurred. The primary authority on the harmless error standard remains *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-28, 17 L.Ed.2d 705 (1967), where the Supreme Court held that constitutional errors may he treated as harmless unless a court can conclude, beyond a reasonable doubt, that the evidence complained of might have contributed to the defendant's conviction. Accordingly, a habeas court reviewing a state court's determination of harmless error must conclude that *Chapman*, the federal jurisprudence on harmless error, was misapplied in order to issue a writ under § 2254(d). *See Nevers*, 169 F.3d at 371.

would be entitled to habeas relief.[5]

We find that the state trial court's error in failing to specifically instruct the jury that Barker would have been justified in using deadly force to stop an imminent rape had a substantial and injurious influence effect in determining the jury's verdict and resulted in actual prejudice to Petitioner Barker. As best explained by Justice Marilyn Kelly (then of the Michigan Court of Appeals and currently on the Michigan Supreme Court), the standard instruction on self defense simply states that one is entitled to use deadly force when one is in danger of death or great bodily harm. *Barker*, 446 N.W.2d at 553. This

> leaves the door open for a juror to decide that forcible rape in a given case would have caused neither death nor great bodily harm. The juror could then reasonably conclude that the accused was not entitled to kill the rapist to prevent the rape. The instructions must inform

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[5] We note that neither the magistrate judge nor the district court had the benefit of this Circuit's decision in *Nevers* when they each considered Barker's petition for the writ. In considering whether the Michigan Supreme Court's application of the harmless error test was "unreasonable," the magistrate, utilizing the Fifth Circuit's standard, asked whether the Michigan Supreme Court's finding of harmless error was so clearly incorrect that it would not be debatable among reasonable jurists. (J.A. at 833-34). The magistrate concluded that the Michigan Supreme Court's determination was not "unreasonable" because there was sufficient evidence to sustain it, namely: (1) the victim was 81 years old, suffered from various physical ailments, and relied on a case; (2) Petitioner was in her early twenties, was five feet seven inches tall, and weighed 170 pounds; and (3) the victim was struck on the head with a blunt object ten times and stabbed thirty two times. (J.A. at 837).

The approach taken by the magistrate, however, is premised on the assumption that the Michigan Supreme Court's finding of harmless error could not be considered "unreasonable" because its conclusion (*i.e.*,that no reasonable juror would have believed Barker's claim of self defense because the amount of force used was excessive) was adequately supported by the record. Thus, the approach taken by the magistrate interprets "unreasonable" in its ordinary sense as synonymous with irrational, illogical or unsubstantiated. Under this Circuit's standard, as established in *Nevers*, however, a state court's determination is considered "unreasonable" in the harmless error context, if it is simply proven that the error had a substantial and injurious effect or influence in determining the jury's verdict and resulted in actual prejudice - a plaintiff does not have to demonstrate that the state court's determination was irrational, illogical, or unsubstantiated.

> the jury explicitly that, if it reasonably appeared necessary to the person assailed, she was entitled to use deadly force to repel a rapist.

Id.

Of course, we have no way of knowing what effect the general self defense instruction actually had upon the jurors evaluating Barker's guilt or innocence. We have no way of definitively knowing whether, on the basis of the general self defense instruction, any of the jurors did in fact reject Barker's claim of self defense because that juror believed Madsen's attack would not have lead to death or great bodily injury. But we are certain that the general self defense instruction gave the jurors the latitude to believe, on the one hand, that Barker was resisting a rape, yet on the other hand question whether the rape led to death or serious bodily injury. This is sufficient to raise grave doubt as to whether the general self defense instruction created a substantial and injurious influence on the verdict. *See O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 994, 130 L.Ed.2d 947 (1995).

Only if a federal habeas court can say with certainty that a trial error had little to no impact on the judgment, should the judgment stand. *See Id.* at 435-38, 115 S.Ct. at 994-995. In this matter, the only thing of which this court is certain is that the erroneous jury instruction left the door wide open. A reasonable juror could have very well walked through the door and rejected Barker's claim for self defense because that juror believed that Madsen's assault would not have led to death or serious bodily injury, thereby resulting in a substantial and injurious influence on the verdict. Since there is grave doubt as to whether the erroneous jury instruction created a substantial and injurious influence on the verdict, the error was not harmless. Accordingly, then, the Michigan Supreme Court engaged in an unreasonable application of *Chapman's* harmless error test, and under § 2254(d), a writ of habeas corpus should issue.

We further believe that the Michigan Supreme Court improperly invaded the province of the jury in determining

that, although the general self defense instruction was erroneous in Barker's case, the error was harmless because no reasonable jury could have believed that the force used by Barker was necessary to prevent rape by an 81-year old "enfeebled" man. The Sixth Amendment and the Due Process clause guarantee a defendant's constitutional right to a trial by jury. As the Supreme Court has recognized, the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993). This right is further interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978) (holding that a jury instruction which effectively took from the jury the issue of intent improperly invaded the jury's factfinding function); *Herrington v. Edwards*, No. 97-3542, 1999 WL 98587, at *3 (6th Cir. Jan. 26, 1999) (unpublished disposition) ("The court must not dictate the outcome [of the proceedings]. If it does so, it has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause."). However, that is precisely what the Michigan Supreme Court did by finding that the erroneous jury instruction was harmless because no reasonable juror would have believed Barker's claim of self defense. *See Barker*, 468 N.W.2d at 494. First, the Michigan Supreme Court asserted that because the victim received ten blows to the head and was stabbed thirty two times, no reasonable juror would have believed that such force was necessary to resist a sexual assault by an "enfeebled" victim. *See Id.* However, there was sufficient evidence in the record which might have supported rational conclusions to the contrary. In particular, Barker's testimony might support an inference that she stabbed the victim in such a frenzy because he persisted in his attack despite her struggle and numerous protests. (J.A. at 188-95). Yet, the Michigan Supreme Court must have wholly discredited this testimony in arriving at its conclusion that the amount of force used was unjustified. Similarly, the court's conclusion that the victim was "enfeebled" rejects testimony to the contrary which established that although the victim

walked with a cane, he was "a strong man, a big man." (J.A. at 480).

Hence, it is apparent to this panel that the Michigan Supreme Court's determination that the erroneous jury instruction was harmless necessarily means that the court believed some evidence but discredited other evidence. This, however, it cannot do and remain in compliance with our constitutional guarantees. It is neither the proper role for a state supreme court, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. Rather, it is for the jury, with the proper self defense instruction, to decide whether the amount of force was justifiable or unjustifiable. Similarly, it is for the jurors to determine whether they believed the victim was enfeebled, or was instead capable of such an assault. Only the jury has the responsibility of arriving at a final determination of Barker's guilt or innocence, and a state supreme court cannot usurp this role.

During oral arguments, counsel for Respondents argued that *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), binds this panel to hold that the Michigan Supreme Court's finding of harmless error did not constitute improper fact finding. In *Rose*, the Supreme Court acknowledged that, although the determination of guilt or innocence is for the jury rather than the court, harmless error analysis addresses a different question - what is to be done about trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? *See id.* at 582 n. 11,106 S.Ct. at 3108 n. 11. We do not find *Rose*, however, entirely dispositive of the instant matter. As we noted earlier, it cannot be said with any confidence that the error in this case had no effect on the outcome. To the contrary, it is quite possible that the general self defense instruction did affect the outcome by allowing a juror to reject Barker's claim for self defense, even if Barker was about to be raped, because the juror did not believe the rape would have resulted in death or great bodily harm. Moreover, although the *Rose* court cautions that, theoretically, nearly all trial errors can be considered to have invaded the province of the jury and altered the terms under which the jury

considered a defendant's guilt or innocence, *see id.*, the court in *Rose* certainly could not have meant that a trial error **could never** constitute a usurping of the jury's factfinding role by the court. Since, in the instant matter, the Michigan Supreme Court's finding of harmless error rests squarely on credibility judgments and the court's evaluation of conflicting evidence, this panel does not consider its ruling a derogation of *Rose's* cautionary advice.

This panel also finds that the Michigan Supreme Court's finding of harmless error in this matter substantially impaired Petitioner's due process right to present a full defense. The Supreme Court has stated that "[w]e have long interpreted this standard of [fundamental] fairness [guaranteed by the Sixth Amendment and the Due Process Clause] to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984) (finding that the due process right to present a complete defense has been interpreted to guarantee a defendant's right of access to evidence). *See also Zemina v. Solem*, 438 F.Supp. 455, 466-70 (D.S.D. 1977), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) (erroneous jury instruction which went to defendant's theory of defense supported a finding of constitutional error); *Miller v. South Dakota*, 338 N.W.2d 673, 676 (S.D. 1983) (although errors in instructing the jury do not always rise to a constitutional level, "if the error goes to the heart of a defendant's theory of defense it can infringe upon defendant's rights to due process and jury trial.").

Barker's sole defense is that she killed the victim in order to prevent an imminent rape. The trial court's refusal to instruct the jury that a defendant has the right to use force, even deadly force, to resist a rape clearly goes to the very essence of Barker's claim of self defense. In this case, a juror may have reasonably interpreted the general self defense instruction to require Petitioner to demonstrate that: (1) a rape was imminent; and (2) that rape would have led to death or serious bodily injury. Michigan law, however, requires only that a defendant who used self defense to resist an imminent rape to demonstrate the former. By adding what is effectively another element to Petitioner's burden, the general self defense

instruction undermined Barker's defense. Petitioner simply cannot be considered to have had a meaningful opportunity to present a complete defense when the jury was so plainly misinstructed on a matter critical to her defense. That the self defense instruction at issue is vitally important to a full and vigorous defense is underscored by the fact that Michigan law itself requires the instruction be given when there is a sufficient evidentiary basis to show that the defendant used self defense to prevent a rape. *See Barker*, 468 N.W.2d at 493. Instead of having a meaningful opportunity to present a full and vigorous defense, then, Petitioner's claim of self defense was significantly impeded and her due process rights to present a defense severely prejudiced.

This court is mindful that a habeas petitioner faces an uphill battle in establishing that an erroneous jury instruction is so prejudicial that he or she is entitled to habeas relief. The petitioner may not simply show that the instruction was undesirable, erroneous, or even universally condemned. *See Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). Instead, the petitioner must show that the improper instruction "so infected the entire trial that the resulting conviction violates due process." *Id.* at 147, 94 S.Ct. at 400. Although the burden is undeniably heavy, of course, this does not mean that a jury instruction may never rise to such proportions, *see id.*, and we find that the failure to provide a specific self defense instruction on the issue of rape was so prejudicial to Barker's defense that in this case that burden has been satisfied.

In sum, we conclude that the trial court's failure to specifically instruct the jury that Petitioner Barker was entitled to use deadly force to prevent a sexual assault had a substantial and injurious influence on the jury's verdict and resulted in actual prejudice to Petitioner Barker. On that basis, we find that the Michigan Supreme Court engaged in an unreasonable application of the harmless error test under 28 U.S.C. § 2254(d). We further conclude that the Michigan Supreme Court's finding of harmless error violated Barker's constitutional rights to a trial by jury and to present a complete defense.

III. CONCLUSION

For the foregoing reasons, the panel **REVERSES** the district court's denial of habeas relief, and orders that a conditional writ of habeas corpus be granted unless the State of Michigan commences trial proceedings against Ms. Barker within 180 days of this opinion. Should the State of Michigan decide to retry Ms. Barker, an appropriate jury instruction should be provided instructing the jury that a defendant is justified in using force, even deadly force, if she reasonably believes that a sexual assault is imminent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STACEY BARKER,

Petitioner,

vs.

No. 97-CV-71292-DT
Hon. Gerald E. Rosen

JOAN YUKINS, et al.,

Respondents.
_____/

JUDGMENT

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on JAN 30 1998
PRESENT: Honorable Gerald E. Rosen
United States District Judge

The Court having this date entered an Order (1) adopting the Magistrate Judge's December 4, 1997 Report and Recommendation, (2) denying Plaintiffs petition for habeas corpus relief, and (3) dismissing this case,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs petition for habeas corpus relief be, and hereby is, DENIED and accordingly, this case is DISMISSED.

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Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STACEY BARKER,

Petitioner, No. 97-CV-71292-DT

vs. Hon. Gerald E. Rosen

JOAN YUKINS, et al.,

Respondents.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DISMISSING PLAINTIFF'S HABEAS CORPUS ACTION

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on JAN 30 1998

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This matter having come before the Court on the December 4, 1997 Report and Recommendation of United States Magistrate Judge Paul J. Komives recommending that the Court deny Plaintiffs petition for a writ of habeas corpus, and that this case, accordingly, be dismissed; and Petitioner having timely filed Objections to the Magistrate's Report and Recommendation; and the Court having reviewed the Magistrate Judge's Report and Recommendation, Petitioner's Objections thereto, and the Court's file of this action and having concluded that, for the reasons stated in the Report and Recommendation, Plaintiffs petition for habeas corpus relief should be denied; and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation of December 4, 1997 be, and hereby is, adopted by this Court.

IT IS FURTHER ORDERED that, for the reasons set forth in the Magistrate Judge's Report and Recommendation, Plaintiffs petition for habeas corpus relief be, and hereby is DENIED and the above-captioned case, therefore, is DISMISSED.

Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STACEY BARKER,

Petitioner,

v. CASE NO. 97CV-71292-DT
JUDGE GERALD E. ROSEN
MAGISTRATE JUDGE PAUL J. KOMIVES

JOAN YUKINS, et al.,

Respondents.
_____/

REPORT AND RECOMMENDATION

I. RECOMMENDATION: The Court should deny petitioner's application for the writ of habeas corpus.

II. REPORT:

A. *Procedural History*

1. Petitioner Stacey Barker is a state prisoner, currently confined at Scott Correctional Facility in Plymouth, Michigan.[1]

2. On November 17, 1987, petitioner was convicted of first degree murder, MICH. COMP. LAWS § 750.316, following a jury trial in Oakland County Circuit Court. On December 4, 1987, she was sentenced to a mandatory term of nonparolable life imprisonment.

3. Petitioner appealed as of right to the Michigan Court of Appeals, raising the following claims:

[1] Petitioner has been temporarily transferred to the Huron Valley Center, a facility under the control of the Michigan Department of Mental Health. James Haveman, Jr., Director of the Department of Mental Health, has been joined by petitioner as a respondent in this action.

I. WAS DEFENDANT DENIED EQUAL PROTECTION AND HER RIGHT TO AN IMPARTIAL JURY WHEN THE PROSECUTOR USED A PEREMPTORY CHALLENGE TO STRIKE A BLACK VENIRE PERSON FROM THE JURY, AND THE TRIAL COURT ERRED IN UPHOLDING THE PROSECUTOR'S IMPERMISSIBLE EXERCISE OF THAT CHALLENGE?

II. DID THE COURT DENY DEFENDANT A FAIR TRIAL WHEN IT DECLINED A DEFENSE REQUEST TO INSTRUCT THE JURY THAT A PERSON IS ENTITLED TO USE DEADLY FORCE IN DEFENDING HERSELF AGAINST WHAT SHE HONESTLY BELIEVES IS THE DANGER OF SEXUAL ASSAULT?

III. DID THE TRIAL COURT ABUSE ITS DISCRETION AND DENY DEFENDANT A FAIR TRIAL WHEN IT ADMITTED INTO EVIDENCE OVER DEFENSE OBJECTION A FOURTEEN MINUTE VIDEO TAPE OF THE CRIME SCENE AND THE BODY OF THE DECEDENT WHEN THE TAPE WAS HIGHLY INFLAMMATORY AND UNNECESSARY TO ILLUMINATE A MATERIAL ISSUE IN THE CASE?

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION AND DENY DEFENDANT A FAIR TRIAL WHEN IT INTRODUCED INTO EVIDENCE TWO COLOR PHOTOGRAPHS OF THE DECEASED WHICH WERE NOT RELEVANT TO A DISPUTED MATERIAL ISSUE AND FAR MORE PREJUDICIAL THAN PROBATIVE?

The court of appeals found no merit in any of these claims and affirmed petitioner's conviction in a published opinion. *People v. Barker*, 179 Mich. App. 702, 446 N.W.2d 549 (1989) (per curiam). One judge separately concurred, concluding that the trial court's refusal to specifically instruct the jury that petitioner was entitled to use deadly force to resist a sexual assault was erroneous, but that such error was harmless. *Barker*, 179 Mich. App. at 711, 446 N.W.2d at 552 (Kelly, J; concurring).

4. Petitioner sought leave to appeal these issues to the Michigan Supreme Court. The Supreme Court granted the application for leave to appeal, "limited to the issue whether the trial judge erred reversibly by refusing to instruct the jury that defendant was entitled to use deadly force to resist sexual assault." *People v. Barker*, 435 Mich. 867, 457 Mich. 691 (1990). The Supreme Court affirmed the court of appeals decision on different grounds, concluding that although the trial court erred in failing to give the requested instruction, the error was harmless. *People v. Barker*, 437 Mich. 161, 468 N.W.2d 492 (1991). One justice dissented, concluding that the error was not harmless. *Barker*, 437 Mich. at 165-74, 468 N.W.2d at 494-95 (Levin, J., dissenting).

5. Petitioner, represented by counsel, filed the instant petition for habeas corpus on March 27, 1997. She raises two grounds for writ of habeas corpus:

I. THE MICHIGAN SUPREME COURT DEPRIVED MS. BARKER OF THE CONSTITUTIONAL RIGHT TO A TRIAL BY JURY (TOGETHER WITH ALL OF ITS ATTENDANT RIGHTS) WHERE THE SUPREME COURT UPHELD HER CONVICTION DESPITE AN ADMITTEDLY DEFECTIVE JURY INSTRUCTION BECAUSE THE COURT BELIEVED THE STATE'S WITNESSES OVER THE DEFENSE WITNESSES.

II. MS. BARKER WAS DENIED EQUAL PROTECTION (AND HER RIGHT TO AN IMPARTIAL JURY) WHEN THE PROSECUTOR USED A PEREMPTORY

CHALLENGE TO STRIKE A BLACK VENIRE PERSON FROM THE JURY, AND THE TRIAL COURT ERRED IN UPHOLDING THE PROSECUTOR'S IMPERMISSIBLE EXERCISE OF THAT CHALLENGE.

6. Respondents filed their answer on September 18, 1997. They contend that petitioner's first claim is unexhausted and therefore barred by the procedural default doctrine, and that petitioner's second claim does not entitle her to the writ of habeas corpus.

B. *Exhaustion of State Remedies*

Respondents argue that petitioner has failed to exhaust her first claim in the state courts by "fairly presenting" the claim to the Michigan Supreme Court. Generally, a habeas petitioner must exhaust her state law remedies before seeking federal habeas relief by fairly presenting the substance of each federal constitutional claim in state court. 28 U.S.C. § 2254(b) and (c); *Picard v. Connor*, 404 U.S. 270, 275-278 (1971). "A petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." *Levine v. Torvik*, 986 F.2d 1506,1516 (6th Cir. 1993). In general, a petitioner has satisfied the exhaustion requirement when he has presented his claim to the state's highest court. *Manning v. Alexander*, 912 F.2d 878, 881(6th Cir. 1990).

If a petition contains both exhausted and unexhausted claims, the general rule is to dismiss such mixed petitions for exhaustion of all claims. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). However, a petitioner's failure to exhaust state remedies does not deprive the court of its jurisdiction to consider the merits of the habeas petition. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). A federal court may decide a habeas petition on the merits when the grounds for relief are without merit or are not cognizable on habeas review. *Cain v. Redman*, 947 F.2d 817, 820 (6th Cir. 1991); *Prather v Rees*, 822 F.2d 1418, 1421-1422 (6th Cir. 1987). In these circumstances, the court should dismiss the non-federal or frivolous claim on

its merits to save the state courts the useless review of meritless constitutional claims. *Cain*, 947 F.2d at 820.

In both the Michigan Court of Appeals and the Michigan Supreme Court, petitioner raised a claim that the trial court's failure to instruct the jury that she was entitled to use lethal force to resist a sexual assault deprived her of a fair trial. However, respondent argues that these claims were formulated differently than petitioner's habeas claim, which asserts that petitioner was deprived of her constitutional right to trial by jury by the Supreme Court's decision affirming her conviction. In support of their position, respondents rely on *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam). However, the Court should conclude that *Duncan* does not support respondent's position.

In *Duncan*, as respondents correctly note, the Court did state that "mere similarity of claims is insufficient to exhaust." *Duncan*, 513 U.S. at 366. However, the import of this passage is understood only in the context of the case. In *Duncan*, the petitioner had raised a state law evidentiary claim in the state court system, without asserting that the error deprived him of a fair trial under the Due Process Clause. He then filed a habeas petition in federal court asserting such a constitutional violation. Noting that the purpose of the exhaustion requirement is "to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights," *id.* at 365 (internal quotation omitted), the Court reasoned that the petitioner's state law evidentiary claim, although similar to his constitutional claim, was insufficient:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary hearing at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Id. at 366.

In this case, the state courts were alerted to the fact that petitioner was raising a claim under the United States Constitution. In her brief to the Michigan Supreme Court, for example, petitioner asserted that she had been denied her right to due process under the constitution because the jury had not been properly instructed, citing to *Powell v. Alabama*, 287 U.S. 45 (1932) and U.S. CONST. amends. V, XIV. *See* Br. in Supp. of Application for Leave to Appeal, at 19 (docket entry # 21).[2] Although phrased somewhat differently in her statement of the issues, petitioner's current claim is essentially the same: that she has a constitutional right to trial by jury under the constitution which includes the right to have the jury properly instructed on legally recognized defenses. *See* Pet. for Writ. of Habeas Corpus, at 29.

Contrary to respondents' assertion, there is nothing in *Duncan* which suggests that there must be an exact identity of language between petitioner's state court brief and her federal habeas petition. Indeed, there is nothing in *Duncan* which even suggests that there must be an exact identity between the cases and other authorities relied on in the state court brief and the federal petition. Rather, all that is required is that the federal constitutional issue be fairly identified and presented to the state court in such a way that the state court has an opportunity to be alerted to the existence of a federal constitutional question and have the opportunity to pass on the question. Because the state courts were given the opportunity here, the Court should conclude that petitioner has properly exhausted her first habeas claim, and should consider the merits of the claim. *See Johnston v. Love*, 940 F.

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[2] In her state supreme court brief, petitioner also cited *In re Sliverthorn*, 73 Mich. 644, 41 N.W. 834 (1889), in which the court held:

> Before the citizen should be deprived of his liberty, and subjected to such a degrading penalty, he should be permitted to avail himself of all his constitutional rights, which include "due process of law" in criminal cases, and which has not yet been conferred upon these officers. He is not only entitled to have the facts of his case passed upon by a jury, but to have the jury properly instructed concerning the law applicable to the facts by a court competent to give such instructions.

Id. at 647, 41 N.W.2d at 835. This, too, is sufficient to constitute a fair presentation of the federal constitutional issue to the state courts. *See Levine*, 986 F.2d at 1516 ("A petitioner 'fairly presents' his claim to the state courts by . . . state decisions employing a constitutional analysis[.]")

Supp. 738, 760 (E.D. Pa. 1996), *aff'd*, 118 F.3d 1576 (3d Cir.), *cert. denied sub nom. Johnston v. Frank*, 66 U.S.LW. 3337 (U.S. Nov.10, 1997); *Sanabria v. Morton*, 934 F. Supp. 133, 144 (D.N.J. 1996) (claim was properly exhausted under *Duncan* where the state cited federal constitutional case law in its brief opposing petitioner's direct appeal, because the government's brief alerted the state court of the constitutional question and gave the state court the opportunity to pass on that question); *Keating v. Hood*, 922 F. Supp. 1482, 1492 (C.D. Cal. 1996); *cf. Duncan*, 513 U.S. at 366-37 (Souter, J., joined by Ginsburg and Breyer, JJ., concurring in the judgment) (concurring only on the basis that the petitioner had raised only a state law claim, and not a federal claim).[3]

C. *Standard of Review*

1. *Applicability of the Antiterrorism and Effective Death Penalty Act*

As an initial matter, the Court must determine what standard of review applies to petitioner's claims. Because petitioner's application was filed after April 26, 1996, it appears that her petition should be governed by the provisions of the recently enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 26, 1996). However, petitioner argues that this statute should not apply to her petition because her state criminal appeals were completed prior to the passage of the AEDPA. Petitioner raises essentially two arguments: (1) the AEDPA does not apply under the retroactivity test established in *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244 (1994); and (2) "enforcing this provision would unlawfully delegate the constitutional adjudication power of this Court (and even the United States Supreme Court) to state courts." Pet. for Writ of Habeas Corpus, at 36. Accordingly, petitioner contends, her petition should be analyzed under the

[3] The fact that the Michigan appellate courts did not address petitioner's claims as constitutional claims is irrelevant. As the Supreme Court has noted, "[i]t is too obvious to merit extended discussion that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court[.]" *Castille v. Peoples*, 489 U.S. 346, 350 (1989).

presumably more lenient pre-AEDPA standard of review. However, because each of petitioner's arguments are without merit, the Court should analyze petitioner's application under the standards codified by the AEDPA.

a. *Retroactivity Under Landgraf*

In *Landgraf* the Court clarified the standard for determining whether a newly enacted statute applies to cases pending at the time of its enactment. In determining the effect of an intervening change in the law, the court must reconcile the general rule that "'a court is to apply the law in effect at the time of it renders its decision,"' *Landgraf,* 511 U.S. at 264 (quoting *Bradley v. Richmond Sch. Bd.,* 416 U.S. 696, 711(1974)), with the sometime conflicting rule that "'[r]etroactivity is not favored in the law."' *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988)) (alteration in original). Thus, the first inquiry is whether Congress has explicitly made clear its intent to apply the statute to conduct antedating the enactment of the statute. If Congress has, the statute applies to cases pending at the time of its enactment. If Congress has not, the inquiry shifts to a determination of whether application of the statute to a pending case would have "retrospective," or "retroactive," effect. If the application of the statute would have retroactive effect, then the statutory presumption against retroactivity will bar application of the statute to a pending case. However, if application of the statute would not have a retroactive effect, then the rule requiring a court to apply the law in effect at the time it renders its-decision controls, and the statute will be applied. *See Landgraf,* 114 S. Ct. at 1499-1502, 1505.

However, read careful, *Landgraf* does not apply here because petitioner's case was not pending at the time the AEDPA was enacted. This conclusion is supported the Court's recent decision in *Lindh v. Murphy,* 117 S. Ct. 2059 (1997). In *Lindh,* the Supreme Court held that the provisions of the AEDPA applicable to non-capital cases do not apply to habeas petitions which were pending at the time the AEDPA was enacted based. Applying *Landgraf* the Court resolved the issue at the first inquiry, concluding, by negative implication, that an express provision applying the capital-

case amendments to pending petitions reveals that Congress's silence with respect to the non-capital case amendments indicates Congress's intent that the non-capital provisions do not apply to pending petitions. The Court reasoned: "We read this provision of § 107(c) [of the AEDPA], expressly applying chapter 154 [the capital case amendments] to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 [non-capital cases] were assumed and meant to apply to the general run of habeas cases *only when those cases had been filed after the date of the Act.*" *Lindh*, 117 S. Ct. at 2063 (emphasis added). According to the Court, therefore, "[t]he statute reveals Congress's intent to apply the amendments to chapter 153 only to *such cases as were filed after the statute's enactment.*" *Id.* at 2063 (emphasis added).

Or, put another way, under the first *Landgraf* inquiry Congress clearly expressed its intent to apply the AEDPA to all habeas applications filed in the federal courts after the statute's enactment, as evidenced by the language of *Lindh* quoted above. Indeed, post-*Lindh* cases applying the AEDPA support this conclusion. *See, e.g., Pratt v. United States*, ___ F.3d ___, 1997 WL 680045, at *3 (1st Cir. Nov. 6, 1997) ("Here, moreover, we know on the best of authority that Congress intended that AEDPA apply to all section 2255 petitions filed after its effective date[.]") (citing *Lindh*); *Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 127 F.3d 782, ___, 1997 WL 576048, at *4-*5 (9th Cir. Sept. 18, 1997) (AEDPA applies to petitions filed after the statute's enactment); *Holman v. Gilmore*, 126 F.3d 876,880 (7th Cir. 1997) (AEDPA applies to petition filed after April 24,1996); *Chapdelaine v. United States*, No. 97-160P, 1997 WL 446465, at *4 (D.R.I. July 28,1997) ("Applying the Supreme Court's reasoning [in *Lindh*] to the motion presently before this court requires the conclusion that Congress intended the § 2255 time-limitation provision set forth in the AEDPA amendments to chapter 153 to, at minimum, apply to all motions filed on or after the AEDPA's enactment date[.]"); *Jenkins v. Cain*, ___ F. Supp. ___, 1997 WL 594268, at *3 (W.D. La. July 7,1997) (holding that statute of limitations provision of 28 U.S.C. § 2244 applies to petition filed after enactment of AEDPA, reasoning that "[i]t is difficult to evade the language in *Lindh* that chapter 153 applies to 'cases filed after the Act became effective.'").

This conclusion is also supported by another Supreme Court case applying the AEDPA. In *Felker v. Turpin*, 116 S. Ct. 2333(1996), the Court "uncritically applied AEDPA['s restriction on second habeas petitions] to a prisoner's second habeas petition even though the prisoner had filed his first petition prior to AEDPA's enactment." *Pratt*, ___ F.3d ___, ___, 1997 WL 680045, at *3 (citing *Felker*, 116 S. Ct. at 2336-37). Based on this language from *Felker* a number of courts have applied the AEDPA's restrictions on second petitions to second petitions filed after the statute's effective date, even though the first petition was filed prior to enactment. *See, e.g., In re Medina*, 109 F.3d 1556, 1561-62 (11th Cir. 1997); *Roldan v. United States*, 96 F.3d 1013,1014 (7th Cir. 1996); *Hatch v. Oklahoma*, 92 F.3d 1012,1014 (10th Cir. 1996). This conclusion is directly applicable here: the AEDPA applies to petitioner's application even though the state trial and appeals process underlying her conviction occurred prior to the AEDPA's effective date. Accordingly, the Court should conclude that *Landgraf* does not compel application of the pre-AEDPA standards to petitioner's claims.

b. Adjudicatory Powers of the Federal Courts

Likewise, the Court should reject petitioner's claim that the standard of review provision of the AEDPA, codified at 28 U.S.C. § 2254(d), intrudes on the adjudicatory powers of the federal courts by "requir[ing] a federal judge to defer to a state judge's interpretation of federal constitutional law[.]" Pet. for Writ of Habeas Corpus, at 37. Essentially, petitioner claims that the AEDPA is unconstitutional because it violates principles of separation of powers. Petitioner's argument fails for two reasons.

First, contrary to her assertion, the standard of review provision of the AEDPA does not require the federal courts to defer to state courts' interpretations of federal law. The relevant provision provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

> proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under subsection (1), although the federal court is required to give some deference to the state court's *application* of federal law to the facts of the particular case, it is still the province of the federal courts, namely the Supreme Court, to determine *what* is federal law. Contrary to petitioner's assertion, under the amended § 2254(d) it remains the province and duty of the federal courts to say what the law is, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and the Supreme Court clearly remains the "ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962).[4]

Further, the AEDPA does not represent an impermissible delegation of the federal courts' authority to the state courts. Unlike the cases cited by petitioner, in which the Court has found that Congress may not delegate authority to determine the constitutionality of various governmental actions to executive departments or agencies, the AEDPA does not delegate any authority to the state courts beyond that which they already possess. Rather, § 2254(d) merely addresses the scope of the federal courts' authority to issue the writ of habeas corpus. As the Court explained in *Felker:* "[W]e have long recognized that 'the power to award the writ by any of the courts of the United States must be given by written law,' and we have likewise recognized that judgments about the

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[4] Indeed, even if the AEDPA allowed the state court to be the "final arbiter" of federal law with respect to a petitioner's application for habeas relief under § 2254(d), the Supreme Court still remains the "final arbiter" of federal law with respect to a petitioner's underlying petition, because the petitioner may seek direct review of his conviction in the Supreme Court, *see* 28 U.S.C. § 1257, or may file an original application for writ of habeas corpus under 28 U.S.C. § 2241, *see Felker*, 116 S. Ct. at 2338-39.

proper scope of the writ are 'normally for Congress to make.'" *Felker*, 116 S. Ct. at 2340 (citations omitted) (quoting, respectively, *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) and *Lonchar v. Thomas*, 116 S. Ct. 1293, 1298 (1996)).

Indeed, the amended § 2254(d) quite simply "is consistent with the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues, and that their decisions must be respected by federal district judges in processing habeas corpus applications[.]" *Swain v. Pressley*, 430 U.S. 372, 383 (1977); *see also, Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1975) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states."); *cf. Allen v. McCurry*, 449 U.S. 90, 105 (1980) (recognizing ability of state courts to pass on federal constitutional issues); *Moore v. Sims*, 442 U.S. 415, 430 (1979) (same); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-11 (1975) (same). In short,

> [i]n passing § 2254(d), Congress has not usurped the Court's judicial function. Under the Act, federal courts are still able and required to exercise independent judgment to determine whether the state court's decision was contrary to, or involved an unreasonable application of, federal law. If the state court's application of federal law was unreasonable, the federal court has the power to grant the writ. Therefore, the Act does not violate Article III.

Duncan v. Calderon, 946 F. Supp. 805, 813 (CD. Cal. 1996); *see also, Lindh v. Murphy*, 96 F.3d 856, 868-69 (7th Cir. 1996) (section § 2254(d) does not violate Article III), *rev 'd on other grounds*, 117 S. Ct. 2059 (1997); *Perez v. Marshall*, 946 F. Supp. 1521, 1531 (S.D. Cal. 1996) (same), *aff'd*, 121 F.3d 716 (9th Cir. 1997). Accordingly, the Court should conclude that petitioner's application for the writ of habeas corpus is governed by the standard of review codified at 28 U.S.C. § 2254(d), as amended by the AEDPA.

2. *Standard of Review Under § 2254(d)*

As noted above, amongst other amendments, the AEDPA amended the substantive standards for granting habeas relief by providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Subsection (d)(1) deals with habeas challenges based on errors of law or mixed questions of law and fact, while subsection (d)(2) applies to challenges based on purely factual errors. *See Gomez v. Acevedo*, 106 F.3d 192, 199 & n.7 (7th Cir. 1997); *Dukes v. Hunt*, 952 F. Supp. 276, 281 (E.D.N.C. 1996); *Thomas v. Gramley*, 951 F. Supp. 1338, 1341-42 (N.D. Ill. 1996). Under subsection (d)(1), a petitioner will be entitled to relief only if the state court's decision of a purely legal issue was contrary to clearly established law as decided by the Supreme Court, or if the court's application of that law to the facts was unreasonable. *See Gomez*, 106 F.3d at 199; *Drinkard v. Johnson*, 97 F.3d 751, 768-69 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997); *Thomas*, 951 F. Supp. at 1341-42. This standard is more deferential than the pre-AEDPA standard. *Stone v. Farley*, 86 F.3d 712, 716 n.3 (7th Cir. 1996). As the Fifth Circuit recently explained, with respect to purely legal determinations the question is whether the state "court correctly determined the law applicable to [petitioner]'s

claim[.]" *Drinkard*, 97 F.3d at 768. With respect to the state court's application of the law to the facts, the Fifth Circuit explained:

> This "unreasonable application" standard of review of a state court decision must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a *de novo* review. The use of the word "unreasonable" in formulating this restrictive standard of review implicitly denotes that federal courts must respect all *reasonable* decisions of state courts. Thus, given the statutory language, and in light of the legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is *unreasonable* only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 768-69; *accord Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored. By posing the question whether the state court's treatment was 'unreasonable,' § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject."), *revd on other grounds*, 117 S. Ct. 2059 (1997).[5]

Similarly, under subsection (d)(2) a federal court reviewing purely factual determinations may grant the writ of

[5] In examining whether the state court's decision was one of the types specified in subsection (d)(1) for granting the writ, the Court "remain[s] free to look beyond those cases and reasons relied upon by the state court opinion in determining whether the standards for issuance of the writ set forth in § 2254(d)(1) have been met." *Thomas*, 951 F. Supp. at 1342.

habeas corpus only where the state court's determinations are "unreasonable." Although no case has directly discussed what constitutes an "unreasonable" factual determination, the "unreasonable application" language of subsection (d)(1) is analogous. Thus, a factual determination will be unreasonable only where it "is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 768-69; *see also*, 28 U.S.C. § 2254(e)(1) (formerly § 2254(d) (state court findings of fact are presumed to be correct, and this presumption may only be rebutted by clear and convincing evidence).

D. *Analysis of Petitioner's Habeas Claims*

1. *Failure to Instruct Claim*

At trial, petitioner presented a self-defense theory to the jury. Under her version, she killed the victim while resisting his attempted sexual assault. The trial court gave a general self-defense instruction to the jury, but refused to specifically instruct the jury that a person may use deadly force to resist a sexual assault, as required by Michigan law. *See People v. Heflin*, 434 Mich. 482, 456 N.W.2d 10 (1990). On petitioner's appeal, the Michigan Supreme Court found that "the trial court erred when it failed to instruct the jury correctly with regard to the use of deadly force[.]" *Barker*, 437 Mich. at 164, 468 N.W.2d at 493. However, the court went on to hold that the error was harmless:

> The decedent was eighty-one years old, walked with a cane, and was described as being unsteady on his feet. The defendant is in her early twenties, five feet, seven inches tall, and weighs 170 pounds.
>
> The evidence thoroughly contradicted the defendant's version of how and why she killed the elderly and infirm victim. We agree with Judge Marilyn Kelly's concurring opinion in the Court of Appeals that, on this record, no reasonable juror would have believed the defendant's claim of self-defense. Defendant bludgeoned the deceased ten times and stabbed

> him thirty-two times. Some of the wounds appeared to have been inflicted while he attempted to crawl away. No reasonable juror could have believed such force was necessary to prevent rape by the enfeebled deceased.

Barker, 437 Mich. at 164, 468 N.W.2d at 494 (internal quotation marks and alterations omitted) (quoting *People v. Barker*, 179 Mich. App. 702, 711, 446 N.W.2d 549, 552 (1989) (Kelly, J., concurring)).[6] Thus, the question before this Court under § 2254(d) is whether the Michigan Supreme Court's conclusion that the instructional error was harmless is contrary to, or involved an unreasonable application of, established federal law as determined by the United States Supreme Court.

In *Chapman v. California*, 386 U.S. 18 (1967), the Court held that constitutional errors in a trial do not necessarily require reversal, and the Court since *Chapman* has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681(1986). Subsequently, in *Rose v. Clark*, 478 U.S. 570 (1986), the Court explicitly applied the harmless error analysis in the context of erroneous jury instructions. *See id.* at 576-82. *Rose* also necessarily commands that the harmless error analysis is applicable where the alleged error in jury instructions was the failure to give a requested instruction. *See, e.g., Rodriquez v. Young*, 906 F.2d 1153, 1166 (7th Cir. 1990) (applying harmless error analysis to failure to instruct claim without explicit discussion of *Rose); Blazic v. Henderson*, 900 F.2d 534, 542-43 (2d Cir. 1990)

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[6] Justice Levin dissented from the court's opinion, concluding:

> It cannot properly be said that no reasonable juror would have believed that Madsen [the victim] made a sexual assault on Barker. Nor can it properly be said that an instruction that Barker could use deadly force to prevent oral sexual advances--Barker's lawyer spoke of Madsen seeking to kick Barker's body--may not have resulted in acquittal, conviction of a lesser offense, or another mistrial because all twelve jurors were unable to agree on a verdict.

Barker, 437 Mich. at 166, 468 N.W.2d at 495 (Levin, J., dissenting).

(same); *Richie v. Gomez*, No. C-95-3300 MHP, 1996 WL 440672, at *2 (N.D. Cal. July 26,1996) (*Rose* requires harmless error analysis in context of failure to give requested instruction).[7]

In petitioner's case, the Michigan Supreme Court used the correct legal standard for the harmless error analysis. Although the court did not cite to decisions of the United States Supreme Court, it noted that, on the record, "no reasonable juror would have believed the defendant's claim of self-defense." *Barker*, 437 Mich. at 164, 468 N.W.2d at 494. This accurately portrays the *Chapman*-type harmless error analysis, and thus the Michigan Supreme Court's decision was not, on its face, "contrary to . . . clearly established Federal law" under § 2254(d)(1).

Turning to the second prong of the § 2254(d)(1) inquiry, it cannot be said that the Michigan Supreme Court's application of the harmless error test was "unreasonable." As

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[7] Prior to the enactment of the AEDPA, a federal court reviewing jury instructions (including an alleged failure to instruct) did not, precisely, analyze the issue under the harmless error test. Rather, prior to the AEDPA, the courts held: "A state trial court's refusal to given an instruction does not alone raise a ground cognizable in a federal habeas corpus proceeding. The error must so infect the entire trial that the defendant was deprived of his right to a fair trial guaranteed by the due process clause of the fourteenth amendment [sic]." *Tyler v. Wyrick*, 635 F.2d 752, 753 (8th Cir. 1980) (citation omitted); *accord Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988). Further, in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Court held that a federal habeas court does not apply the *Chapman* harmless error analysis, which asks whether the error was harmless beyond a reasonable doubt, but rather the harmless error analysis announced in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), which asks whether the error had a substantial and injurious effect on the jury's verdict. *See Brecht*, 507 U.S. at 635-37.

Under the AEDPA, however, a federal habeas court no longer asks these questions. Rather, the court's inquiry is whether (a) the state court applied the correct harmless error standard for direct review—i.e., the *Chapman* harmless error standard; and (b) the state court's application of that standard was reasonable in light of the facts of the case. *See* 28 U.S.C. § 2254(d)(1); *see also, Jeffries v. Wood*, 114 F.3d 1484, 1500-1501 (9th Cir.) (AEDPA, if applied, would not preclude habeas relief where the state court failed to apply *Chapman* harmless error standard, rendering its decision contrary to clearly established federal law), *petition for cert. filed*, 66 U.S.L.W. 3157 (U.S. Aug. 11,1997); *Miller v. Page*, No.96 C 4293, 1997 WL 684988, at *4 (N.D. Ill. Oct. 30, 1997) ("This court cannot say that the Illinois Appellate Court was unreasonable in concluding that the constitutional error it found was harmless. Therefore, the issue cannot be the basis for granting petitioner habeas relief."); *United States ex rel. Ayala v. Washington*, No.97 C 2864, 1997 WL 627648, at *3 (N.D. Ill. Sept. 30, 1997).

noted by the court's majority opinion, and the concurring opinion of Judge Kelly in the court of appeals, the evidence at trial showed that the victim was 81 years old, suffered from various physical ailments, and relied on a cane to walk. In contrast, petitioner was in her early twenties, was five feet, seven inches tall, arid weighed 170 pounds. Further, the evidence showed that the victim had been bludgeoned with a blunt object ten times and had been stabbed thirty two times. *Barker*, 437 Mich. at 162-63,164, 468 N.W.2d at 493,494; *see also, Barker*, 179 Mich. App. at 711, 446 N.W.2d at 552 (Kelly, J., concurring). The only contradictory evidence was the testimony of petitioner herself. *See Barker*, 437 Mich. at 170-74, 468 N.W.2d at 496-98 (Levin, J., dissenting). Further, although the jury was not specifically instructed that petitioner could use deadly force to resist an imminent sexual assault, the jury was instructed that petitioner "could defend herself from death or 'serious bodily harm' with force, 'even to the extent of taking a human life if necessary.'" *Barker*, 437 Mich. at 163, 468 N.W.2d at 493. Based on these circumstances, six of the seven state court judges to consider the harmless error issue found the failure to give the instruction to be harmless.[8] Based on the evidence before the trial court, and the fact that the jury was instructed on self-defense generally, it cannot be said by this Court that the decision of these judges was an "unreasonable application" of the *Chapman* harmless error analysis. *See Carter v. Johnson*, 110 F.3d 1098, 1108 (5th Cir. 1997) ("If reasonable jurists could disagree, the state court decision on a mixed question of law and fact is not 'an unreasonable application of federal law,' and thus the decision is immune from federal habeas attack."); *Drinkard*, 97 F.3d 769 (Under § 2254(d)(1), "we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists."). Accordingly, the Court should deny the application

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[8] The harmless error issue was considered only by Judge Kelly in the court of appeals. Further, in the supreme court, Justice Mallett did not participate in the decision. Thus, one court of appeals judge and six supreme court justices considered the harmless error issue. Of these, only Justice Levin found that the failure to give the requested instruction was not harmless error.

for writ of habeas corpus on this ground.[9]

2. *Batson Claim*

Petitioner next claims that the prosecutor impermissibly exercised a peremptory challenge to exclude a black venire person solely on the basis of her race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and that the state courts erred in finding that the prosecutor's proffered reason for striking the venireperson was not based on impermissible considerations of race. In *Batson*, the Court held that "[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race[.]" *Batson*, 476 U.S. at 89 (citation and internal quotation omitted).[10] In evaluating *Batson* claims, a court

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[9] Petitioner phrases her failure to instruct claim in terms of her right to a trial by jury. In essence, petitioner claims that, by engaging in the harmless error inquiry, the Michigan Supreme Court usurped the jury's role by weighing the evidence in her case. However, the dissent in *Rose* raised a similar argument, which was rejected by the majority:

> We agree that the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court. Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? This question applies [to a wide variety of trial errors]. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and therefore theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument--that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome--logically implies that all such errors are immune from harmless-error analysis. Yet this Court repeatedly has held to the contrary.

Rose, 478 U.S. at 582 n.11.

[10] *Batson* has been extended to prohibit gender-based peremptory challenges, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Further, *Batson* has been extended to prohibit impermissible race or gender based challenges by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42 (1992) and by parties in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

must follow a three-step process:

> First, the defendant prosecutor must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (plurality opinion) (citations omitted) (citing *Batson*, 476 U.S. at 96-98). Further, as pre-AEDPA decisions have noted, "[t]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact that is entitled to 'great deference on appeal.'" *Kelly v. Withrow*, 25 F.3d 363, 367 (6th Cir. 1994) (quoting *Hernandez*, 500 U.S. at 364). Thus, under the AEDPA, a state court's determination that a prosecutor's use of peremptory challenges was not motivated by discrimination will be upheld, and a petitioner will not be entitled to habeas relief, unless it can be said that the state court's decision amounted to an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[11]

After setting forth the proper legal standard under *Batson*, the Michigan Court of Appeals summarized and analyzed petitioner's claim as follows:

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[11] There is no question that the Michigan Court of Appeals applied *Batson* in analyzing petitioner's claim, and thus the court applied the correct legal standard under § 2254(d)(1). *See Barker*, 179 Mich. App. at 705-06, 446 N.W.2d at 550-51. It may be that the state court's determination that the prosecutor's use of preemptory challenges was not discriminatorily motivated constitutes an application of this legal standard to the facts--that is, a mixed question of law and fact--under § 2254(d)(1) rather than a purely factual determination under § 2254(d)(2). However, as discussed above, *supra* part C.2, the "unreasonable application" language of subsection (d)(1) and the "unreasonable determination" language of (d)(2) essentially establish the same standard. Thus, the result is the same whether petitioner's claim is analyzed under either subsection.

Turning to the case at bar, defendant objected to the prosecutor's using a peremptory challenge to excuse one of two black venirepersons. The prosecutor explained that he struck the one black juror because of her similarity to defendant in terms of age and status. The prosecutor further explained that he also dismissed two white jurors for similar reasons. Finally, the prosecutor explained that he did not peremptorily excuse the other black juror on the panel because she was older than defendant and had a good job. That is, the black juror who remained was not similar to defendant in age and status. Thereafter, the trial court indicated that it was satisfied with the prosecutor's explanation and ruled that the peremptory challenge was properly exercise.

> In this case, the prosecutor offered a racially neutral explanation for exercising his peremptory challenge to strike one of the two black venirepersons. The trial court accepted this explanation, concluding that the prosecutor was properly motivated in exercising the peremptory challenge. We must give great deference to that determination. . . . In this case, we are satisfied with the prosecutor's explanation that he did not exercise his peremptory challenge with respect to this juror merely because the juror was black.

Barker, 179 Mich. App. 706-07, 446 N.W.2d at 551.

Neither this decision, nor the original finding of fact made by the trial court, was unreasonable. First, the fact that the prosecutor did not strike another black venireperson, while not dispositive, is a relevant consideration in assessing the prosecutor's motives. *See United States v. Williamson*, 53 F.3d 1500,1510 (l0th Cir. 1995); *United States v. Marin*, 7 F.3d 679, 686 n.4 (7th Cir. 1993); *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992); *United States v. Grandison*, 885 F.2d 143, 147 (4th Cir. 1989).

Further, the prosecutor "articulate[d] a neutral explanation related to the particular case to be tried," *Batson*, 476 U.S. at 98, as required under *Batson*. The prosecutor struck the black venireperson (and a similar white

venireperson) based on her age, education, and "status," presumably meaning either marital or socioeconomic status. These are permissible considerations for the exercise of a peremptory challenge. *See, e.g., Marin*, 7 F.3d at 686-87 ("The attainment of a certain educational level has been accepted by numerous circuits as a race-neutral criterion for exercising a peremptory challenge under the *Batson* mandate, and, as far as we can determine, has been rejected by none."); *United States v. Mixon*, 977 F.2d 921, 923 (5th Cir. 1992) (education and employment experience permissible considerations); *United States v. Lane*, 886 F.2d 103, 105-06 (4th Cir. 1989) (education permissible consideration); *United States v. Nicholson*, 885 F.2d 481, 482 (8th Cir. 1989) (age, marital status, and employment experience permissible considerations); *United States v. McCoy*, 848 F.2d 743, 745 (6th Cir. 1988) (age and employment experience permissible considerations); *United States v. Harrell*, 847 F.2d 138, 139 (4th Cir. 1988) (education and employment experience permissible considerations); *United States v. Clemons*, 843 F.2d 741, 748-49 (3d Cir. 1988) (age and marital status permissible considerations).[12] Accordingly, the determination by the state court that the prosecutor's peremptory challenge was not racially motivated was not unreasonable under § 2254(d)(2), and petitioner is not entitled to the writ of habeas corpus on this ground.

E. *Conclusion*

In view of the foregoing, the Court should conclude that petitioner has properly exhausted her habeas claims. The

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[12] Relying on Justice Marshall's concurring opinion in *Batson*, petitioner asserts that age may be an impermissible basis on which to exercise a peremptory challenge. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring) ("[T]he age rationale is highly suspect because of its inherent susceptibility to abuse."). However, as the plurality stated in *Hernandez*, "neutral explanation . . . means an explanation based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360. The only other characteristic which this definition has been expanded to exclude consideration of is gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Further, it is unlikely that the Supreme Court would expand the *Batson* rule to prohibit peremptory challenges based on age. The *Batson* rule is grounded in the Equal Protection Clause of the Fifth and Fourteenth Amendments. However, unlike race and gender, age is not a classification subject to heightened protection under the Equal Protection Clause. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 311-12 (1976).

Court should also conclude that her claims are properly analyzed under 2254(d), as amended by the 'Antiterrorism and Effective Death Penalty Act. Applying the standard of § 2254(d), the Court should conclude that petitioner is not entitled to the writ of habeas corpus because she has not shown that the decisions of the Michigan Court of Appeals and Michigan Supreme Courts were contrary to, or involved an unreasonable application of established federal law, nor that they involved an unreasonable determination of fact.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Serv's.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

PAUL J. KOMIVES
UNITED STATED
MAGISTRATE JUDGE

Dated: December 2, 1997

PEOPLE v BARKER

Docket No. 87039. Argued December 5, 1990 (Calender No. 9). Decided April 22, 1991.

Stacey Barker was convicted by a jury in the Oakland Circuit Court, Fred M. Mester, J., of first-degree murder. The Court of Appeals, SULLIVAN, P.J., and SAWYER, J. (MARILYN J. KELLY, J., concurring), affirmed in an opinion per curiam (Docket No. 106235). The defendant seeks leave to appeal to determine whether the trial judge erred in refusing to instruct the jury that she was entitled to use deadly force to resist a sexual assault.

In a memorandum opinion, signed by Chief Justice CAVANAGH and Justices BRICKLEY, BOYLE, RILEY, and GRIFFIN, the Supreme Court *held:*

The trial court did err, but the error was harmless.

Upon request, and where there is a sufficient evidentiary basis, a court must instruct the jury that force, including deadly force, may be used to repel an imminent forcible sexual penetration. In this case, there was both a request and an evidentiary basis for such an instruction, and it should have been given. Although the trial court erred in failing to so instruct the jury, the error was harmless. No reasonable juror would have believed the defendant's claim of self-defense.

Affirmed.

Justice LEVIN, dissenting, stated that the trial court erred in failing to instruct the jury that the defendant was justified in using force, including deadly force, if she honestly and reasonably believed that it was necessary to use such force to repel an imminent forcible sexual penetration, but the error was not harmless. It properly cannot be said that no reasonable juror would have believed that the victim sexually assaulted the defendant or that an instruction that the defendant could use deadly force to prevent oral sexual advances may not have resulted in acquittal, conviction of a lesser offense, or another mistrial.

Justice MALLETT took no part in the decision of this case.

179 Mich App 702; 446 NW2d 549 (1989) affirmed.

Frank J. Kelley, Attorney General, *Gay Secor Hardy*, Solicitor General, *Richard Thompson*, Prosecuting Attorney, *Michael J. Modelski*, Chief, Appellate Division, and *Richard H. Browne*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Gail Rodwan*) for the defendant.

Amicus Curiae:

Mogul, Posner & Cohen (by *Marjory B. Cohen*) for the Women Lawyers Association of Michigan.

MEMORANDUM OPINION. In this case we granted leave to appeal to determine "whether the trial judge erred reversibly by refusing to instruct the jury that the defendant was entitled to use deadly force to resist a sexual assault. Cf. *People v [Heflin]*, 434 Mich 482 [456 NW2d 10] (1990)." 435 Mich 867 (1990). After considering this matter, we are persuaded that the trial court did err, but that the error was harmless. We therefore affirm the judgments of the Court of Appeals and the Oakland Circuit Court.

This defendant has been convicted of first-degree murder. MCL 750.316; MSA 28.548. The Court of Appeals has summarized the facts:

> Briefly, the victim was an eighty-one-year-old white male and retired Lutheran minister. He suffered from various physical ailments and relied on a cane to walk. Defendant is a young, black woman who worked as a companion to another resident in the same apartment complex as the victim. Defendant and the victim were acquainted and defendant was present at the victim's apartment on the evening of his death. Defendant admits to killing the victim, but claims that she did so in self-

> defense. Specifically, defendant claims that the victim started to make sexual advances towards her and would not stop even when she resisted. According to the medical examiner, the victim suffered ten blows to the head with a blunt instrument and approximately thirty-two stab wounds to the back. In a statement to the police during the investigation, defendant indicated that her reaction and the extent of her conduct in defending herself was in part a result of her having been previously raped and the fear of it happening again. [179 Mich App 702, 704-705; 446 NW2d 549 (1989).]

Using the standard instruction, the trial court instructed the jury that the defendant could defend herself from death or "serious bodily harm" with force, "even to the extent of taking a human life if necessary." See CJI 7:9:01, now CJI2d 7.15. However, the trial court refused the defendant's timely request that the standard self-defense instruction be modified so that the jury would be specifically informed that deadly force may be used to resist a "sexual assault."[1]

We addressed this issue in *People v Heflin*, 434 Mich 482; 456 NW2d 10 (1990), reh den 435 Mich 1203 (1990). This Court's opinions contained varying formulations of the precise basis and extent of a court's obligation to give such an instruction. However, a majority of us were in agreement that, upon request and where there is a sufficient evidentiary basis, a court must instruct the jury that force, including deadly force, may be used to repel an imminent forcible sexual penetration.[2] *Id.*, pp 502-503, 509-515, 527-530, 551-567. In the present case, there was both a request and an evidentiary basis for such an instruction, and it should have been given.

Although the trial court erred when it failed to instruct the jury correctly with regard to the use of deadly force, the

[1] The term "sexual assault" may mean a variety of things, including sexual activity which contemplates something less than forcible sexual penetration. Here, the defendant testified concerning actions of the deceased, and stated that these actions caused her to fear that would rape her, i.e., that he would force her to engage in sexual penetration. Defense counsel's generalized request was grounded in evidentiary basis.

[2] As with any use of deadly force, defendant's belief must be both honest and reasonable.

error was harmless for the reasons stated in the concurring opinion in the Court of Appeals. 179 Mich App 710-711. The decedent was eighty-one years old, walked with a cane, and was described as being unsteady on his feet. The defendant is in her early twenties, five feet, seven inches tall, and weighs 170 pounds.

The evidence thoroughly contradicted the defendant's version of how and why she killed the elderly and infirm victim. We agree with Judge MARILYN KELLY's concurring opinion in the Court of Appeals that, on this record, no reasonable juror would have believed the defendant's claim of self- defense.

> Defendant bludgeoned the deceased ten times and stabbed him thirty-two times. Some of the wounds appeared to have been inflicted while he attempted to crawl away. . . . [N]o reasonable juror could have believed such force was necessary to prevent rape by the enfeebled deceased. [*People v Barker*, 179 Mich App 702, 711 (KELLY, J., concurring).]

For these reasons, we affirm the judgments of the Court of Appeals and the Oakland Circuit Court.

CAVANAGH, C.J., and BRICKLEY, BOYLE, RILEY, and GRIFFIN, JJ., concurred.

LEVIN, J. (*dissenting*). I concur in the conclusion that the trial court erred in failing to instruct the jury that Stacey Barker was justified in using "force including deadly force" if she honestly and reasonably believed that it was necessary to use such force "to repel an imminent forcible sexual penetration."[1]

I dissent from the Court's disposition because I do not agree that the error was harmless, either for the reasons stated

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[1] *Ante*, p 163.

in the concurring opinion in the Court of Appeals,[2] or for the reasons stated in the memorandum opinion.

The evidence suggests that there was, and is consistent with, a sudden affray. Barker assaulted Frank Madsen with impromptu weapons; first with a statuette that she obtained from the top shelf of furniture in the foyer of Madsen's apartment and then, after the struggle continued in the kitchen, with a kitchen knife.

This Court should not lightly assume that an eighty-one-year-old man does not have sexual interests, and is incapable of being aroused by and making a sexual assault on a younger woman:

> In general, there is no reason why healthy older people cannot continue to enjoy sex until almost the very end. A man, despite a lowered

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[2] *People v Barker*, 179 Mich App 702, 710-711; 446 NW2d 549 (1989).

The memorandum opinion states that in *People v Heflin*, 434 Mich 482; 456 NW2d 10 (1990), "a majority of us were in agreement that, upon request and where there is a sufficient evidentiary basis, a court must instruct the jury that force, including deadly force, may be used to repel an imminent forcible sexual penetration. *Id.*, pp 502-503, 509-515, 527-530, 551-567." *Ante*, pp 163-164.

The references to pp 527-530 are to a dissenting opinion, and the references to pp 551-567 are to another dissenting opinion.

The references to pp 502-503 are to the opinion in *Heflin* rather than to the opinion in the companion case of *People v Landrum* (signed by two of the justices with two others concurring in the result only), reported sub nom as *People v Heflin*. It was in the portion of the opinion addressing *Landrum's* appeal that the issue was dealt with on pp 509-515 of the lead opinion as follows:

> Rather than specify each and every statutory definition of criminal sexual conduct that would mandate an instruction regarding self-defense, we would hold that a person may use deadly force in self-defense to repel a criminal sexual assault when confronted with force that the person reasonably believes could result in imminent death or serious bodily harm. This instruction addresses the delicate balance between the well established doctrine of self-defense on the one hand, and the extremely egregious and personally intrusive crime of criminal sexual conduct on the other. Accordingly, we would hold that a trial court should instruct the jury that a person may use deadly force in self-defense to repel a criminal sexual assault when confronted with force that the person reasonably believes could result in imminent death or serious bodily harm. [*Id.*, pp 512-513.]

> sperm count, is still capable of fathering children even into his eighties . . . . [Rosenfeld, *Prolongevity II* (New York: Alfred A. Knopf, 1985), p 177.]
>
> Although sperm production slows down after age forty, it continues into the eighties and nineties. [Masters, Johnson & Kolodny, *Human Sexuality* (Boston: Little, Brown & Co, 1982), p 170.]

It cannot properly be said that no reasonable juror would have believed that Madsen made a sexual assault on Barker. Nor can it properly he said that an instruction that Barker could use deadly force to prevent oral sexual advances-- Barker's lawyer spoke of Madsen seeking to lick Barker's body--may not have resulted in acquittal, conviction of a lesser offense, or another mistrial because all twelve jurors were unable to agree on a verdict.

I

As set forth in the memorandum opinion, Barker requested an instruction that deadly force may be used to resist a "sexual assault."[3] The memorandum opinion states that Barker was entitled to an instruction "that force, including deadly force, may be used to repel an imminent

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[3] *Ante*, p 163. While Barker claimed that she was fearful of being raped, and hence, fearful that Madsen was seeking sexual penetration, her lawyer suggested, in requesting the instruction in terms of "sexual assault," that Madsen may have been seeking oral sexual contact.

forcible sexual penetration."[4]

The memorandum opinion does not state that a judge should instruct the jury with respect to what the term "sexual penetration" means. Judges may therefore read the memorandum opinion either as not requiring, or not permitting, an instruction in that regard. It should be made clear that the instruction should generally state that "sexual penetration" includes not only vaginal intercourse, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body,"[5] and that emission of semen is not required.

The judge who filed the concurring opinion in the Court of Appeals said that Barker "bludgeoned the deceased ten times and stabbed him thirty-two times. Some of the wounds appeared to have been inflicted while he attempted to crawl away."[6] The judge said that although the jurors were not told that Barker "was entitled to use deadly force, no reasonable juror could have believed such force was necessary to prevent rape by the enfeebled deceased." *Id.*

While the prosecutor argued that Frank Madsen was crawling away, the medical examiner testified that he was

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[4] *Ante*, p 163. The substitution of "penetration" for "assault" suggests that the majority is of the opinion that such an instruction may not be required where the defendant fears "imminent" intentional touching of her "intimate parts" even though she honestly and reasonably believes nothing less than deadly force will prevent such touching.

The terms "sexual contact" and "sexual penetration" are defined in the Penal Code as follows:

> (k) "Sexual contact" includes the intentional touching of the victims or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.
>
> (l) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight of any part of a person's body or of any object into the genital or anal openings of another person's body, but emmision of semen is not required. [MCL 750.520a(k), (l); MSA 28.7881(1)(k), (l).]

[5] See n 4.

[6] 179 Mich App 702, 711; 466 NW2d 549 (1989)

unable to determine whether the assailant, Barker, was standing behind, in front of, or at the side of Madsen when the wounds were inflicted. Barker testified that, rather than crawling away, Madsen continued to assault her after she struck him on the head with the statuette, and followed her into the kitchen. And it was for that reason that she picked up a kitchen knife, and, in a frenzy, stabbed him as many times as she did.

A woman who cleaned Madsen's apartment every day, and who discovered Madsen's body, described him as "a strong man, a big man."

It was for the jurors, and not for the judges of the Court of Appeals or for the justices of this Court, to decide whether Madsen was attempting to crawl away or was continuing a sexual assault when he was stabbed. It was also the function of the jurors, and neither our function nor that of the Court of Appeals, to decide--if the jurors found that Madsen had initiated and persisted in a sexual assault--the extent to which he was enfeebled, and the force Barker honestly and reasonably believed to be necessary to prevent a continuation of the sexual assault.

If the jurors concluded, in agreement with the concurring Court of Appeals judge, that deadly force was not needed to prevent rape, they might nevertheless, if properly instructed that Barker "was entitled to use deadly force if she honestly and reasonably believed that a sexual assault/forcible sexual penetration was imminent, have found her guilty of a lesser offense than first-degree murder. Thus, even if none of the jurors "'believed such [deadly] force was necessary to prevent rape by the enfeebled deceased,'"[7] one or more of the jurors, if so properly instructed, might have reasonably concluded--as we are advised one juror did in the first trial[8]--that Barker was guilty of the lesser offense of manslaughter.

III

The majority does not state the basis for the conclusion set forth in the memorandum opinion that the "evidence

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[7] *Id.*, p 711. See *ante*, p 164, for text.

[8] We are also advised that the other eleven were prepared to convict Barker of an offense other than first-degree murder.

thoroughly contradicted the defendant's version of how and why she killed the elderly and infirm victim."[9]

The constitution provides:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent. [Const 1963, art 6, § 6.]

The majority does not state the facts, other than to repeat the summary provided by the majority in the Court of Appeals. The majority in the Court of Appeals did not, however, predicate affirmance on harmlessness of instructional error, but rather on its conclusion that there was no instructional or other error. Accordingly, the factual narration provided by the Court of Appeals did not focus on the asserted harmlessness of the error.

Barker, her counsel, bench and bar, and the public at large are left to wonder what evidence the majority has in mind in stating that the evidence thoroughly contradicted Barker's version of how and why she killed Madsen. The majority's' conclusory statement does not comply with the constitutional requirement obliging the Court to provide a concise statement of the facts and the reasons for decision.

IV

Madsen's daughter testified that her father was an affectionate man, and that women had called, him a "great kisser."

Madsen's wallet was found in his apartment. containing

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[9] *Ante*, p 164.

$61 in cash[10] and a card with Barker's telephone number written on it. A woman testified that in October, 1986, she was working in a Bennigan's restaurant in Southfield and observed Barker having dinner with an elderly gentleman who walked with a cane. She said that the two were acting "like a young couple, like girlfriend and boyfriend. . . ."

A detective testified that Barker told him that she met Madsen while working for another resident and that they became friends. He invited her to his apartment a number of times, and they went out to lunch and dinner. On another occasion, he paid her for cleaning his apartment.

Barker told the detective that on November 5, Madsen telephoned her and asked her to visit him. They began the evening watching television. He came over on the couch where Barker was and started touching her. "I just started laughing[.] I said, Frank, what are you doing because he had told me that he was impotent."[11]

Barker's aunt and a number of women in the complex where Madsen lived had told her that she should stay away from Madsen "because he was a dirty old man, but I felt like he was just nice and he just needed company." She was not concerned about him trying to sexually approach her, because he had never tried, and he had told her that he was impotent.

This night, he kept pulling on her clothes, telling her he just wanted to touch her:

> [H]e just wanted to look at me and I kept trying to laugh it off and tell him, no, would you stop, you're being bad and he was telling me, you know, that he had been taking me out to dinner, spending money on me, buying me

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[10] There was testimony that Madsen withdrew $200 from his checking account approximately one week before his death on November 5, 1986. A friend of forty years testified that she observed Madsen two days before his death with $300 in cash.

A detective testified that a desk drawer in Madsen's bedroom partially open, with a ledger book and $8 in Canadian money inside the drawer in plain view. There was no blood on the drawer or its contents, nor was there blood on the wallet.

[11] The friend of forty years (see n 10) testified that two and one-half years before his death, Madsen told her that he was impotent

things and giving me money and he had been with me, you know, he had been seeing me for a long time and it was about time I started being nice to him. So I said, Frank, I'm always nice to you and the whole time this was going on he was just laughing and smiling you know, like it was a joke and I kept telling him he was scaring me and to please stop and then he didn't.

* * *

And, you know, he started scaring me because he seemed like he was trying to take advantage of me, but he was laughing so it was like he was joking with me. So I kept saying, Frank, would you please stop, just stop, so I got up and I started walking towards the door. I was just gonna leave because I didn't want him pawing all over me and then he came behind me and he was grabbing me, telling me he wasn't gonna let me go and I really got scared because I had been raped before and I had to see a rape counselor and I just didn't want it to happen again. And then he started pulling on my blouse and I was--I just kept saying over and over please stop, just please leave me alone and then he started grabbing me harder so I just wanted him to leave me alone so I hit him with this statue and then he . . .

* * *

A lot of things are a blur, but all I can remember is that I was scared. I just wanted him to let me go and just leave me alone. I was ready to leave because he was frightening me and once I hit him he just grabbed me even harder and he wouldn't let me go and I kept saying please just let me go.

* * *

And then, you know, once I hit him and he just knocked the statue out of my hand and then he started grabbing me even harder and I was like, Frank, please just let me go, just let me go, and then he wouldn't let me go and the whole time it was like he was smiling. Instead he tried to kiss on me, so he backed me up into the kitchen against the sink and he was kissing on my neck and slobbering on me. And I kept saying, Frank please just let me go, please, just let me go, and then he wouldn't. Then he started pulling my clothes like he was trying to take them off and . . .

* * *

My blouse, my pants, trying to put his hands in my pants and I kept telling him please stop it and so I started crying and I got scared and I thought once, you know, he saw that I was scared and crying he would stop. He had never acted like this before. I swear he had never tried to do anything out of the way to me. He was really frightening me. He kept grabbing me and pulling me. Then he had me up against the sink and he was trying to put his hands in my pants and I couldn't get away from him. I was trying but he was so big. He was--It was like he just had me in a locked position. And I kept saying please and then he started pulling my pants and all I could think of was--all I could think of is he's about to rape me and this is gonna happen all over again. I wouldn't be able to sleep. So I picked up the knife and I just started stabbing him.

* * *

And I started crying and it seemed like everything was blurry. I just didn't even know him. I didn't even know myself. All I could think about was when I was being raped and

beaten a few years before that and then I started stabbing him and he still wouldn't let me go and he took the knife from me.

* * *

I think we was down. He was on top of me. You know, it was like he was trying to hunch on me, like hump on me, and I just kept saying--I just remember I was saying please stop, don't do this to me,. you don't have to do this to me, Frank, please stop. Then he grabbed, he took the knife from me and for a minute I thought, you know, after I stabbed him he was going to try to stab me because I had stabbed him and so I tried to grab the knife back and that's when my finger got cut.

* * *

Yes, it was. No. Like when I move this hand and I do like this, you see how my finger can curve, this finger won't even curve. I think I might have cut a nerve or something.

* * *

Yes, it was really deep, it was wide open. And I said look what you did to me and he saw it and he was still smirking and by that time he had dropped the knife and he was still trying to pull my pants down and I picked the knife up and I started stabbing him again and then he was still pulling on me and then I don't know how many times I stabbed him, but finally he just--he was still and I could just feel blood all over me and I was trying to push him off of me but he was so heavy and I could barely get him off of me. And once I pushed him off of me I was there on my knees. I started--I was still crying and I was shaking him telling him to get up and I kept saying I'm sorry, I didn't mean to

but you wouldn't let me go and then he wouldn't move so I stood up and I didn't know what to do and I was just scared and I just ran off.

MALLETT, J., took no part in the decision of this case.

(Cite as: 179 Mich.App. 702, 446 N.W.2d 549)

PEOPLE of the State of Michigan,

Plaintiff-Appellee,

v.

Stacey BARKER,

Defendant-Appellant.

Docket No. 106265.

Court of Appeals of Michigan.

Submitted April 18, 1989.

Decided Aug. 22, 1989.
Released for Publication Oct. 20, 1989.

Defendant was convicted by jury in the Oakland Circuit Court, Fred M. Mester, J., of first-degree murder and was sentenced to life imprisonment without parole, and she appealed. The Court of Appeals held that: (1) prosecutor could use peremptory challenge to strike one of two black venire members from jury, based on her similarity to defendant, who was black, in terms of age and status; (2) defendant was not entitled to have instruction on self-defense specifically tailored to include instruction that rape victim was entitled to defend herself with lethal force; and (3) videotape of crime scene and autopsy photographs of victim were properly admitted.

Affirmed.

Marilyn J. Kelly, J, concurred in result and filed opinion.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., L. Brooks Patterson, Pros. Atty., Robert C. Williams, Chief, Appellate Div., and Richard H. Browne, Asst. Pros. Atty., for the People.

State Appellate Defender by Gail Rodwan, for defendant-appellant on appeal.

Before SULLIVAN, P.J., and SAWYER and MARILYN J. KELLY, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of murder in the first degree. M.C.L. § 750.316; M.S.A. § 28.548. Defendant was sentenced to a mandatory term of life in prison without parole. She now appeals and we affirm.

Briefly, the victim was an eighty-one-year-old white male and retired Lutheran minister. He suffered from various physical ailments and relied on a cane to walk. Defendant is a young, black woman who worked as a companion to another resident in the same apartment complex as the victim. Defendant and the victim were acquainted and defendant was present at the victim's apartment on the evening of his death. Defendant admits to killing the victim, but claims that she did so in self-defense. Specifically, defendant claims that the victim started to make sexual advances towards her and would not stop even when she resisted. According to the medical examiner, the victim suffered ten blows to the head with a blunt instrument and approximately thirty-two stab wounds to the back. In a statement to the police during the investigation, defendant indicated that her reaction and the extent of her conduct in defending herself was in part a result of her having been previously raped and the fear of it happening again.

[1] Defendant first argues that she was denied her right to an impartial jury when the prosecutor used a peremptory challenge to strike a black venireperson from the jury. We disagree.

The United States Supreme Court has ruled that a prosecutor may not use peremptory challenges to strike blacks from a jury where the defendant is also black. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In looking at such an issue, the burden initially falls upon the defendant to make out a prima facie case of purposeful discrimination. *Id.* 476 U.S. at 93-94, 106 S.Ct. at 1721-22. Once the defendant makes that showing, the burden shifts to the state to explain adequately the racial exclusion. *Id.* at 94, 106 S.Ct. at 1721. Moreover, the state cannot meet its burden on the general assertion that its officials did not discriminate, but must show that permissible racially neutral selection criteria and procedures were used in selecting the jury. *Id.*

To establish a prima facie case, a defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. *Id.* at 96, 106 S.Ct. at 1722. In deciding whether the defendant has made the requisite showing, the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors, the questions and statements made by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose. *Id.* at 97, 106 S.Ct. at 1723.

If a defendant makes such a prima facie showing of discriminatory purpose, the burden shifts to the state to come forth with a neutral explanation for challenging black jurors, though that burden does not rise to the level of requiring the prosecutor to justify the exercise of a challenge for cause. *Id.* at 97, 106 S.Ct. at 1723. However, the prosecutor may not rebut the defendant's prima facie case of discrimination by merely stating that the jurors were challenged on the basis of the assumption, or the prosecutor's intuition, that the jurors would be partial to the defendant because of their shared race. *Id.* Similarly, the prosecutor's mere statements of good faith or denial of a discriminatory motive are insufficient to rebut the defendant's showing of discrimination. *Id.* at 98, 106 S.Ct. at 1723. Rather, the prosecutor must articulate a neutral explanation related to the particular case to be tried. *Id.* The trial court must then determine if the defendant has established purposeful discrimination. *Id.* Finally, the trial

court's findings should be given great deference. *Id.*, n. 21.

Turning to the case at bar, defendant objected to the prosecutor's using a peremptory challenge to excuse one of two black venirepersons. The prosecutor explained that he struck the one black juror because of her similarity to defendant in terms of age and status. The prosecutor further explained that he also dismissed two white jurors for similar reasons. Finally, the prosecutor explained that he did not peremptorily excuse the other black juror on the panel because she was older than defendant and had a good job. That is, the black juror who remained was not similar to defendant in age and status. Thereafter, the trial court indicated that it was satisfied with the prosecutor's explanation and ruled that the peremptory challenge was properly exercised.

In this case, the prosecutor offered a racially neutral explanation for exercising his peremptory challenge to strike one of the two black venirepersons. The trial court accepted this explanation, concluding that the prosecutor was properly motivated in exercising the peremptory challenge. We must give great deference to that determination. Moreover, Batson does not stand for the proposition that a prosecutor is not permitted to use a peremptory challenge to strike a black venireman whenever the defendant is also black. Rather, the prosecutor is prohibited from striking a black venireman simply because the venireman is black. In this case, we are satisfied with the prosecutor's explanation that he did not exercise his peremptory challenge with respect to this juror merely because the juror was black. Accordingly, we conclude that defendant is not entitled to a new trial on this issue.

[2] Defendant next argues that she was denied a fair trial by the trial court's denying her request to instruct the jury that a person is entitled to use deadly force in defending herself against a sexual assault. We disagree. This Court has held that a defendant is entitled to such an instruction. *People v. Landrum* (On Remand), 171 Mich.App. 148, 152, 429 N.W2d 818 (1988), *lv. gtd.* 431 Mich. 905, 433 N.W.2d 74 (1988). See also *People v. Landrum*, 160 Mich.App. 159, 407 N.W.2d 614 (1986), vacated and remanded for reconsideration on other grounds 430 Mich. 861, 420 N.W.2d

573 (1988). We agree with the Landrum Courts' observations that a rape victim has the right to defend herself "unto death." See *Pond v. People*, 8 Mich. 150, 181-182 (1860). However, we disagree with the conclusion in Landrum that a defendant is entitled to have the jury instruction on self- defense specifically tailored to include an instruction that a rape victim is entitled to defend herself with lethal force.

CJI 7:9:01 provides in pertinent part as follows:

> (3) First, at the time of the act the defendant must honestly believe that he is in danger of being killed or of receiving serious bodily harm. If he so believes, he may immediately act and defend himself, even to the extent of taking human life if necessary. Although it may now turn out that the appearances were false and that he was mistaken as to the extent of the real danger, he is to be judged by the circumstances as they appeared to him at the time of the act.
>
> (4) Second, the degree of danger which must be feared is serious bodily harm or death. A person is not justified in killing or inflicting great bodily injury upon another in order to protect himself from what appears to be slight or insignificant injury. In deciding whether at the time the defendant feared for his life or safety, you should consider all of the surrounding circumstances: [the condition of the parties, including their relative strength/whether the other party was armed with a dangerous weapon or had other means to injure the defendant/the nature of the threat or attack of the other party/previous acts of brutality or threats of the other party of which the defendant was aware].

We believe that that instruction adequately instructs a jury on the circumstances under which a person may use lethal force in self-defense and there is no need to specifically instruct the jury as part of the self-defense instruction on

whether lethal force may be used to repel a particular type of assault or to otherwise defend against being the victim of a crime. Moreover, we believe that the peculiar issues of a given case may be adequately addressed by the parties in their closing arguments and in the court's instructions on the parties' theories of the case, if such a theory of the case instruction is requested.[1] In sum, we believe that the jury was adequately instructed.

[3] Finally, we turn to defendant's arguments that the trial court abused its discretion in admitting into evidence a videotape of the crime scene, which showed the victim's apartment and the victim's body lying in the kitchen, and two autopsy photographs taken of the victim. We do not believe the trial court abused its discretion.

This Court discussed the admission of photographic evidence in *People v. Duby*, 120 Mich.App. 241, 256-257, 327 N.W.2d 455 (1982):

> Admission of photographic evidence rests within the sound discretion of the trial court. *People v. Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). On review, the Court must determine whether the photographs were substantially necessary or instructive to show material facts or conditions or whether they were merely calculated to excite passion and prejudice. *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973); *People v Rocha*, 110 Mich App 1, 13; 312 NW2d 657 (1981). The substantially necessary test is nearly the same as asking whether the evidence is helpful in throwing light on any material point in issue. *People v Browning*, 106 Mich App 516, 523; 308 NW2d 264 (1981). Photographs which are pertinent, relevant, competent, or material on any issue in the case are not rendered inadmissible merely because they show the details of a gruesome or shocking crime. *People*

[1] We note that in the case at bar the parties specifically waived having the court read the theories of the case.

> *v Fuzi No 2*, 116 Mich App 277; 323 NW2d 358 (1982). Assuming the materiality of photographs, the trial court must still weigh the potential prejudicial effect against probative value. *People v Wallach*, 110 Mich App 37, 64, fn 6; 312 NW2d 387 (1981).

Moreover, this Court recently stated that the admission of videotaped evidence is "closely analogous" to the admission of photographic evidence. *People v. Sharbnow*, 174 Mich.App. 94, 102, 435 N.W.2d 772 (1989). See also *People v. Ng*, 156 Mich.App. 779, 787-788, 402 N.W.2d 500 (1986). In fact, we believe that the same standard should be applied to videotaped evidence as is applied to photographic evidence. Of course, in exercising its discretion, the trial court must take into account the differences between the two media.

Turning to the case at bar, we do not believe that the trial court abused its discretion in admitting either the autopsy photographs or the videotape of the crime scene. Specifically, we believe that the photographic and videotaped evidence was relevant in that it shed light on defendant's claim of self-defense and the credibility of that claim. The nature and extent of the wounds to the victim, as well as the large number of wounds, tended to contradict defendant's claim of self-defense, as did the nature of the crime scene. As to the latter point, the videotape showed the blood trails and the other appearances of the victim's apartment, which were directly relevant to the issue whether defendant was acting in self-defense. For these reasons, we conclude that the trial court did not abuse its discretion in admitting the evidence.

Affirmed.

MARILYN J. KELLY, Judge (concurring).

I concur in the result. However, I disagree with the position of the majority with respect to the Landrum[1] decision. The defendant is entitled to have the jury

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[1] *People v. Landrum*, 160 Mich.App. 159, 407 N.W.2d 614 (1986), vacated and remanded for reconsideration on other grounds 430 Mich. 861, 420 N.W.2d 573 (1988); *People v. Landrum* (On Remand), 171 Mich.App. 148, 429 N.W.2d 818 (1988), lv. gtd. 431 Mich. 905, 433 N.W.2d 74 (1988).

specifically instructed that she had the right to defend herself from being raped by using force, including deadly force.

The standard instruction on self defense informs jurors that deadly force may be used when one is "in danger of being killed or receiving great bodily harm." It leaves the door open for a juror to decide that forcible rape in a given case would have caused neither death nor great bodily harm. The juror could then reasonably conclude that the accused was not entitled to kill the rapist to prevent the rape. The instructions must inform the jury explicitly that, if it reasonably appeared necessary to the person assailed, she was entitled to use deadly force to repel a rapist. Anything less vitiates the Landrum holding.

In this particular case, the refusal of the trial judge properly to tailor the instruction was error, but it was harmless. Defendant bludgeoned the deceased ten times and stabbed him thirty-two times. Some of the wounds appeared to have been inflicted while he attempted to crawl away. The judge instructed the jury that defendant claimed she acted in lawful self-defense. Although they were not told she was entitled to use deadly force, no reasonable juror could have believed such force was necessary to prevent rape by the enfeebled deceased.

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Sixth Judicial Circuit Court
Oakland County, Michigan
Tuesday, November 17,
1987

THE CLERK: People versus Stacey Barker.

MR. SPIEKERMAN: Charles Spiekerman for the People. We're ready to proceed.

MR. CAMPBELL: Charles Campbell for the Defendant.

MR. SPIEKERMAN: I'm ready for the jury. We have had an opportunity to go over the instructions. It is my understanding the Court wishes to give copies to the jury. I expressed objection to that. The Court does have discretion to do that. I believe Mr. Campbell has one objection to make.

MR. CAMPBELL: Shall I make it now or later?

THE COURT: You may go and get the jury.

MR. CAMPBELL: That part of the instructions that applies to self defense and the use of reasonable force, Your Honor, it seems to me that this self defense instruction is not tailored to this case and the jury may not regard a physical, that is to say a sexual assault within it. Therefore, we ask it be modified to include the words, including a

sexual assault, and if she has an honest belief that a sexual assault is about

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to be perpetrated upon her, she may use deadly force if necessary to repel it, even though the appearances may turn out to be -- the appearances may to out to be false.

THE COURT: Fine, thank you Mr. Campbell. I'll deny it on the same basis that I denied it at the previous trial. I'm satisfied the jury instructions take into account the kind of assault you mentioned. The jury can read into the instructions -- sexual assault is an assault under the Statutes of Michigan, as much as any other violent act.

MR. CAMPBELL: Suppose she feels he only wanted to lick over her body, in other words, not to penetrate?

THE COURT: I've ruled on that regard. Thank you, Mr. Campbell.

You may bring in the jury.
(Jury entered the courtroom at 9:40 a.m.)

THE COURT: You may be seated. Ladies and gentlemen of the jury, the evidence and arguments have been completed. I'll now instruct you as to the law you are to follow. Following the instructions I'm about to give you, you will go to the jury room to deliberate and decide on a verdict.

Sympathy or prejudice must not influence your decision. It is my duty as a Judge to instruct you on the law that you are to apply to this case. It is

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your duty to follow the law as it is given to you.

From time to time you have already been some given instructions. You should consider all of these instructions as a connected series which together will be the law that you are to follow. You should not pick out one or some instructions and disregard others.

It is your duty as jurors to determine the facts. You are the sole and exclusive judges of the facts. You alone determine the weight, the effect and value of the evidence, as well as the believability of the witnesses. You must consider and weight the testimony of all witnesses in evidence. You alone are to determine whether to believe any witness or evidence and the extent to which any witness or evidence should be believed. Again, your decision as to any fact in this case is final.

Basic to our system of justice is the principle a person accused of a crime is presumed to be innocent. This presupposition of innocence started at the beginning of this case and has continued throughout the trial and will continue during your deliberations.

Each and every one of you must be satisfied after deliberating that the Defendant is guilty before you can return a verdict of guilty.

You must begin your deliberations with this presumption of innocence foremost in your minds. The

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fact that the Defendant was arrested and is on

trial is no evidence against her. There must be evidence introduced in this trial that convinces you of the Defendant's guilt beyond a reasonable doubt.

The law does not require a Defendant to prove her innocence or to produce any evidence whatsoever. The burden of proving guilt is on the Prosecution and has continued throughout the course of this trial. At no time has the burden of proof shifted to the Defendant.

His burden of proof means every element of the crime must be proven by evidence beyond a reasonable doubt.

What is a reasonable doubt? A reasonable doubt is a fair and honest doubt, growing out of the testimony or lack of testimony or the unsatisfactory nature of the testimony in the case.

It is not a mere imaginary or possible doubt, but a fair doubt based on reason and common sense. It is such a doubt as to leave your mind after careful examination of all the evidence in this case, in the condition you cannot say you have an abiding conviction to a moral certainty of the truth of the charges here made against this Defendant.

When you deliberate, you are only allowed to consider the evidence which has been properly admitted

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in this case. Many things are not evidence and should not be considered as evidence.

Evidence includes only the sworn testimony of witnesses, the Exhibits which were

admitted into evidence, other facts and testimony which I have told you to consider as evidence.

From time to time during this trial, the Court has had to rule on motions or objections by Counsel. I must do so according to the law and my rulings do not reflect personal opinion about the facts in this case. Such rulings are not evidence. You must not give weight to the rulings or to the number of rulings.

Neither my comments nor instructions are evidence. They should-not be taken as any indication of this Court's opinion as to how you should determine the facts. If you come to believe during the course of this trial this Court is telling you how to decide this case, you must disregard that opinion. Again, you are the sole judges of the facts and you alone have the duty and obligation to decide this case from the evidence.

Any statements or arguments by the attorneys here are not evidence, but are only entered to assist you in understanding the evidence and the theories of each party. The questions which these attorneys ask witnesses are not themselves evidence. It is the answers

of the witnesses which provide evidence.

You should disregard anything said by an attorney which is not supported by the evidence or by your own general knowledge and experience. Of course, you should use your own general knowledge and experience in judging wither any particular evidence seems reasonable and probable.

If you have personal knowledge of a particular place or event you may not consider it, since this case must be decided only from the evidence which has been shown during this trial.

In determining whether any fact has been proven, you should consider all the evidence without regard to which party produced that evidence.

Every defendant in a criminal case has the absolute right not to testify. The Defendant has no obligation to testify or to prove her innocence in any manner. You are not permitted to consider her silence in your deliberations. Her silence must not influence your verdict in any manner whatsoever.

Again we say, you are the sole judges of the facts in this case. You must determine which witnesses you will believe and what weight you will give to their testimony. In doing so, you may take into account the witness's ability and opportunity to observe; his or

her memory; his or her manner while testifying; his or her age; any interest, bias or prejudice he or she may have; the reasonableness of his or her testimony considered in the light of all the evidence in this case.

The fact a witness is a police officer does not give his testimony any greater or lesser weight than the testimony of any other witnesses.

You, as jurors, have the duty of weighing, judging the believability of the